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ABSTRACT

These summaries of recent major court decisions related to school desegregation were prepared in an effort to be of assistance to nonlawyers. As an introduction, the workings of the United States judicial system are outlined, and an overview of school desegregation law since 1954 is provided. Recent decisions by the U.S. Supreme Court that set standards for desegregation cases in all Federal courts are explained. Noteworthy Federal cases in which the U.S. Supreme Court did not make significant rulings during the 1976-77 term are summarized. Some important cases that have arisen recently in the California State court system are discussed. Also provided are guidelines for locating texts of court decisions on desegregation. (Author/EB)

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A CITIZEN'S GUIDE TO SCHOOL DESEGREGATION LAW

July, 1978

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FOREWORD

The National Institute of Education prepared these summaries of recent major court decisions related to school desegregation in an effort to be of assistance to nonlawyers. Since developments in school desegregation law impact on our entire society, and most particularly on teachers, administrators, students, and citizens concerned with our schools, many people have suggested the need for a guide to the law.

The introduction explains how our judicial system works and provides a brief overview of school desegregation law since 1954. Part I explains recent decisions by the U.S. Supreme Court that set standards for desegregation cases in all Federal courts. Part II summarizes noteworthy Federal cases in which the U.S. Supreme Court did not make signiticant rulings during the 1976-77 term. Part III discusses some important cases that have arisen recently in the California State court system. In the interest of brevity, the law in other actively desegregating States, such as New York, New Jersey, Massachusetts, Pennsylvania, and Illinois, is not included because it seemed to be of less current interest to nonlawyers beyond the borders of the involved state.

This booklet was written by Mary von Euler, an attorney on the Desegregation Studies Team, and David L. Parham, a practicing attorney in Cleveland who has prepared analyses of school desegregation cases for the Study Group on Racial Isolation in the Public Schools and its member organizations from the Greater Cleveland area. The views expressed are those of the authors only and are not statements of policy of the Federal Government or the National Institute of Education. Inquiries and comments are welcomed and may be addressed by telephone or in writing to Mary von Euler, Desegregation Studies Team, National Institute of Education, 1200 19th Street N.W., Washington, D.C. 20208, or (202) 254-6271.

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INTRODUCTION

In 1954 the U.S. Supreme Court declared that segregated schools were inherently unequal. Brown v. Board of Education (347 U.S. 483, Brown I)[1] held that a State may not separate black and white children without violating the equal protection clause of the 14th amendment,[2] which states:

> nor shall any State. . .deny to any person within its jurisdiction the equal protection of the laws.

Once a court decides a right has been violated, it attempts to find a remedy to make the injured party "whole." Since 1954, the Federal courts have grappled with complex issues as to how the rights of minority children can be vindicated, how the injured children can in effect be "made whole" (that is, restored to the position they would have occupied in the absence of discrimination), and how injury to future students can be prevented.

There is a difficulty inherent in relying on courts for this kind of answers. Courts rule only on particular cases that are before them--not on hypothetical future controversies. Thus courts are not as free as legislatures to lay out prospective general rules. Yet minority groups--people lacking political power--frequently have only the courts on which to rely. The Bill of Rights and the 14th amendment place limits on what the Government--even a democratically elected one--may do. The courts, as interpreters of the Constitution, are especially needed to protect the rights of unpopular individuals and minority groups from the power of the majority. As a result, judicial decisions are sometimes unpopular with the majority of the voters.

The most important safeguard against arbitrary court decisions is the appeal process. The Federal court system is divided into three levels, the United States district courts, the circuit courts of appeals, and the Supreme

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[1] For an explanation of how court decisions are cited, see the Appendix.

[2] The same principle was applied to the Federal Government in Bolling v. Sharpe, 347 U.S. 497 (1954), which held that racial segregation in the public schools of the District of Columbia violated the due process clause of the fifth amendment.

Court. (Each State has its own separate court system.[3] These usually have two or three levels with functions similar to those that will be described here for the Federal system. Cases brought in State court can rely on State and Federal law, and the State, as well as the Federal, constitution.)

The judge in the district court decides the facts in school desegregation cases. This is because school desegregation cases are considered "in equity" rather than "at law," and as such--for reasons of history, not logic--do not use juries.[4] The judge of the district court deciding a case in equity--like the jury in a case at law--decides the facts, such as "who did what to whom." Only these fact-finders hear the trial testimony and decide which witnesses are credible.

Each decision of the district court usually ends with a memorandum of the Findings of Facts and Conclusions of Law, which lays out which facts the court found relevant and persuasive. The factual determinations of a district court are final and cannot be reversed unless the court of appeals finds them to be "clearly erroneous." In other words, the court of appeals is not supposed to reweigh the factual record or to second-guess the district court as to the facts. The court of appeals can reverse, however, if it finds that the district court judge misinterpreted the law in any way that might affect the outcome. In so doing, the court of appeals is absolutely bound by pertinent decisions of the U.S. Supreme Court. On all questions not specifically covered by a Supreme Court decision, the court of appeals must use its judgment to interpret the Constitution within the guidelines of analogous Supreme Court decisions. On

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[3]This booklet is perhaps arbitrarily selective and concentrates on Federal law. Only a few recent State court decisions in California will be covered. Some interesting earlier decisions that will not be discussed here, for example, upheld State desegregation activity and determined that there was no vested right to attend a "neighborhood school." See, School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729 (1967); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657 (Wash. 1972); Balsbaugh v. Rowland, 290 A.2d 85 (Pa. 1972); Tometz v. Bd. of Ed. of Waukegan City, 237 N.E.2d (Ill. 1968); Pennsylvania Human Relations Commission v. Chester School Dist., 233 A.2d 290 (Pa. 1967); Booker v. Bd. of Ed. of Plainfield, 212 A.2d 1 (N.J. 1965); Addabbo v. Donovan, 209 N.E.2d 112 (N.Y. 1965), cert. denied, 382 U.S. 905 (1965).

[4]The only remedy available in a civil action "at-law" was money damages. Courts of equity were established for cases in which money would not provide an adequate remedy for the wrong. For example, it might be necessary to make a defendant stop what he was doing, and thus prevent future injury, which would require an injunction to prevent continuation of the wrongful act. Thus in school desegregation cases, the children and their parents do not seek money damages; they seek a complex order to make the school authorities operate a nondiscriminatory school system.

questions on which the Supreme Court has not ruled, the court of appeals' word is the law within its own circuit; the district courts in that circuit must follow it. (When the circuit courts differ on an issue, it is up to the Supreme Court to resolve the conflict.)

The Supreme Court's authority derives from the Constitution. The power to declare a law unconstitutional was established under Chief Justice John Marshall in 1803. (Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60). Supreme Court decisions achieve legitimacy by their articulation of fundamental principles of our Constitution and of our society, and by their reliance upon precedent, reason, and logic.

In Brown I the Court decided that segregation was unconstitutional but postponed for reargument issues related to how the Court might remedy illegal segregation. Should the Court order desegregation "forthwith" or "gradual(ly)?" Should the Supreme Court itself formulate detailed decrees? On which issues? Should it use a Special Master or remand to the district court to frame remedies? With what directions? Some of these complex questions are not yet answered fully, as impediments to effective remedies have continually emerged. That tortuous but fascinating history will not be described here.[5]

As to timing, in Brown II, 349 U.S. 294 (1955), the Court said that the plaintiffs must be admitted "to public schools on a racially nondiscriminatory basis with all deliberate speed," and used other equally ambiguous expressions, such as "a prompt and reasonable start toward full compliance" and "as soon as practicable." 349 U.S. 299-301. The implication was that there would be a period of transition from a dual system to a unitary one. After more than a decade of resistance and delay by school boards and district courts, the Supreme Court announced in Alexander v. Holmes County Board of Education that segregated school districts must desegregate "at once." 396 U.S. 19, 20 (1969).

The Supreme Court in Brown II also decided to remand the cases to the district courts to formulate remedies suitable to local conditions and to assess whether local school authorities were proceeding in good faith toward constitutional remedies. It was far from self-evident, however, what a nondiscriminatory school district should look like; and the Supreme Court did not provide the district courts with much guidance. Most of the burden devolved on the appeals courts to decide the legality of grade-a-year plans, pupil placement plans, or freedom-of-choice plans. For example, in 1968 the Supreme Court in Green v. County School Board of New Kent County, 391 U.S. 430, 442, declared that a unitary system was one "without a 'white' school and a 'Negro' school, but just schools." Thus a "freedom-of-choice" plan that seemed on its face to be

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[5]For a good account, see, for example, Frank T. Read, "Judicial Evolution of the Law of School Integration Since Brown v. Board of Education," 39 Law and Contemporary Problems 7 (Winter 1975).

racially neutral but resulted in the perpetuation of racially separate schools was unconstitutional. The emphasis was on the obligation of the school board "to come forward with a plan that promises realistically to work. . .now." Yet even after Green, it was not always clear what steps were necessary to create a unitary school system. Were numerical ratios required or permitted? In U.S. v. Montgomery Co. Board of Education, 395 U.S. 225 (1969), the Court approved a faculty desegregation plan that required the faculty in each school to reflect the racial composition of the entire district's faculty. The way was thus open for extensive desegregation using numerical standards rather than tokenism.

In Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 29 (1971), another in the long series of unanimous school desegregation decisions, this one written by Chief Justice Warren Burger, the Court approved thorough-going, effective desegregation that might entail an array of possible remedial tools, including pairing, clustering, and busing. The plan required every school, to the extent practicable, to reflect the districtwide racial ratio of students to eliminate "all vestiges of state-imposed segregation." 402 U.S. at 15. The Supreme Court said that a remedy must look beyond student assignments to staff, transportation, and extracurricular activities and facilities, including future school construction and abandonment policies. The Supreme Court approved mathematical ratios as a starting point in shaping a remedy, not as an inflexible requirement. 402 U.S. at 25.

The application of these landmark school desegregation cases to school systems in the North has been complicated by the fact that segregation there has not been mandated by State law. Nevertheless, plaintiffs have been able to demonstrate in district after district that segregation has not occurred fortuitously. It has frequently arisen as a result of deliberate state action. Where that has been the case, it is just as surely unconstitutional de jure segregation as when it is the result of statutory law.

A school desegregation case in the North usually involves two separate major rulings by the district court. In the first one, the ruling on liability, the court decides whether the equal protection clause has been violated and provides the reasons for the result. If the court finds in its first ruling that school officials have violated the Constitution, its next major ruling would normally be an order directing the implementation of a specific desegregation plan designed to remedy the effects of the violation. It is common, because of the period of time between the first and second ruling, for the liability decision to be reviewed by appellate courts while the district court continues the process of developing its desegregation order.

To find a constitutional violation in any school desegregation case, a court must find that segregation currently exists and that it was caused by deliberate governmental action. The Supreme Court, in the 1973 Denver case, Keyes v. School District No. 1, 413 U.S. 189, laid out the basic standard for Northern and Western school districts. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action. . .the

differentiating factor between de jure segregation and so-called de facto segregation. . .is purpose or intent to segregate." 413 U.S. 189, 205, 208.

The 1976-77 term of the U.S. Supreme Court included actions taken by the Court in several major school desegregation cases. Those actions were viewed by some as a conservative retrenchment by the Burger Court and by others as a reaffirmation of long-established principles of school desegregation law, with the individual cases being decided on the unique facts presented in each instance. The next two parts of this booklet review the Court's actions, provide background information on the cases decided, and analyze the possible impact they might have on school desegregation cases still pending in the lower courts.

The Court granted review and issued rulings in cases arising in Indianapolis, Milwaukee, Austin, Omaha, Detroit, and Dayton.[6] In a related case challenging on constitutional grounds the zoning regulations of Arlington Heights, Illinois,[7] the Court set forth legal principles that apply as well to school desegregation cases.

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[6]In a number of other cases--including some discussed in Part II, Boston, Louisville, and Wilmington--the Court denied certiorari, that is, it refused to review the case. A Supreme Court decision not to review a particular case leaves the lower court's judgment standing. However, it is a legal rule that the lower court of appeals decision is not controlling outside that circuit, since the Supreme Court has not evaluated the merits of the case.

[7]Village of Arlington Heights v. Metropolitan Housing Development Corp. 97 S.Ct. 555 (1977).

PART I. ACTIONS BY THE SUPREME COURT, 1976-77

Washington v. Davis and Spangler v. Pasadena: Carry-Overs from the 1975-76 Term

A substantial number of the school desegregation actions taken by the Supreme Court during the 1976-77 term rely on Washington v. Davis, 426 U.S. 229 (1976), an employment discrimination case decided during the previous term. The lower court in the Washington case ruled that an employment test was unconstitutional if it was not job-related and if a significantly higher percentage of blacks than whites failed to make a qualifying score. The court of appeals said this was true even if the test was racially neutral on its face and was not intended to discriminate. The Supreme Court reversed.

The Supreme Court said that an otherwise valid governmental action, such as administering an employment test, cannot be ruled unconstitutional solely because it has a racially disproportionate impact.

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny.... Washington, 426 U.S. at 242 (citations omitted).

The Court referred back to the Keyes decision, 413 U.S. 189, 205, 208-9 (1973):

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. Washington, 426 U.S. at 240.

Then, in a signal to lower courts of future Supreme Court actions, the Court said it was aware that various courts of appeals in various contexts had held that disproportional racial impact alone, without regard to discriminatory purposes, suffices to prove racial discrimination violating the equal protection clause of the Constitution. "[T]o the extent," said the Court, "that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." Id. at 245.

Washington v. Davis was decided on June 7, 1976. Six months later the Court raised a question about the meaning of the signal when the Court vacated a decision of the Fifth Circuit[8] which had ordered an extensive desegregation action plan for Austin, Texas (see p. 8).

Another school desegregation decision during the 1975-76 term related not to discriminatory purpose but to how long a district court can keep jurisdiction over a school desegregation case. Back in 1971, the Supreme Court had written in Swann v. Charlotte-Mecklenburg School Board, 402 U.S. 1, that district courts need not keep jurisdiction indefinitely, readjusting student assignments to meet all shifts in population unrelated to governmental action. Chief Justice Burger wrote, for a unanimous Court:

> It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that Federal courts are without power to deal with future problems; but in the absence of a showing that either school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 402 U.S. at 31-32.

The Court did not say that the district court could not keep jurisdiction, and the next Supreme Court decision did not especially clarify the issue. In Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) the Court was faced with a case in which a Federal district court had found the Pasadena schools unconstitutionally segregated in 1970. The school system was ordered to submit a plan to be implemented in September 1970 to correct racial imbalance at all levels. The lower court's order had also addressed the hiring, promotion, and assignment of faculty and staff, and the construction and location of schools. After the first year, schools began to deviate from the court's standard that no school should have a majority of any minority group of students. In January 1974, the school board applied to the district court to modify the order and adopt a new plan, on grounds that the original plan was fully implemented. The court was asked to accept a less rigorous plan (which plaintiffs attacked as restoring segregation) or relinquish jurisdiction over the case. The plaintiffs claimed that racial balance had been achieved in student assignments for only one year and that other violations had not been remedied, but the school board argued that imbalance after the first year was caused by changing residential patterns that were not the responsibility of the school

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[8]The Fifth Circuit has jurisdiction over cases arising in Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida.

system. Nonetheless, the district court and the court of appeals refused to end the court's jurisdiction. The lower court implied that student assignments must continually be readjusted--with no limit to the duration of Federal court jurisdiction. The court of appeals affirmed the action of the district court in maintaining jurisdiction, without agreeing that the "no majority of any minority" standard could be required indefinitely.

The Supreme Court did not rule on the adequacy of the new plan or whether the original plan had been fully implemented. The Supreme Court vacated the court of appeals decision and remanded the case, holding that if a district had fully complied with a court order, several years later the court could not require annual readjustments to undo racial imbalance not caused by governmental action. Justice William Rehnquist's opinion stated:

> Having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations. . .the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns. 427 U.S. at 436-437.

The case has been returned to the district court, where the defendants' motion to dismiss is pending. The Supreme Court did not say that the district court may not now still determine as a question of fact that Pasadena did not fully comply with the 1970 order or that resegregation results from governmental actions. Nor did the Court say that a court order might not in the first instance include the provision that a school board must reassign students each year until a unitary system is achieved, and that might take several years.

It is likely that issues related to resegregation will increasingly face the courts. Already they have arisen in Louisville, Kentucky, and Lubbock, Texas, as well as in Pasadena. The outcome will often depend on difficult problems of proof, resting on an analysis of what caused the resegregation and whether demographic patterns were fixed or altered by governmental action.

Austin Texas: A Minority Opinion Foreshadows Future Decisions

In 1971 the United States Disctrict Court for the Western District of Texas concluded the trial of the school desegregation case brought by the United States against the Austin Independent School District. That court ruled that vestiges of the dual school system maintained for black students prior to 1955 (pre-Brown v. Board of Education) still existed. The court then ordered a desegregation plan proposed by the school system which entailed part-time desegregation, closed the formerly black high school and junior high school, and reassigned students from those schools to predominately white schools throughout the district. Additionally, the district court judge ruled that Mexican-Americans constituted a separate, identifiable ethnic minority in Austin. However, the Austin schools had not practiced de jure segregation of Mexican-American students. In 1972 the full membership of the Fifth Circuit

Court of Appeals reversed the district court's limitation, stating that "discriminatory segregation exists against Mexican-American students and that the proposed part-time integration plan of the school district is inadequate as a desegregation plan." 467 F.2d 848, 885 (5th Cir. 1972) (en banc). On remand, and after additional hearings, the district court in the summer of 1973 again found that the Austin schools had not unconstitutionally segregated Mexican-Americans, specifically finding that there was no intent to segregate Mexican-Americans.[9]

In May of 1976, the Fifth Circuit again reversed the lower court's decision. This time the Fifth Circuit said that the trial judge was reading the "intent" requirement in too limited a fashion. The court said:

> [S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. 532 F.2d 380 at 392 (1976).

The Fifth Circuit reasoned that there was a constitutional violation if (1) there was a neighborhood student assignment policy, (2) with segregated neighborhoods, (3) which naturally and foreseeably resulted in segregated schools, since (4) the inference of intent to maintain segregated schools is inescapable, unless no affirmative action to the contrary could have resulted in desegregation. Judge John Minor Wisdom used the ordinary rule of tort law that

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[9]The court said that five identifiable Mexican-American schools had originally opened as predominately Anglo schools, but changing residential patterns unrelated to actions of the Austin schools had caused the transformation. Similarly, said the court, five schools that opened as identifiable Mexican-American schools had been built to serve the rapidly expanding East Austin area in accordance with the "historically honored" neighborhood school concept.

a person intends the natural and foreseeable consequences of his action (choosing school sites, assigning children and staff, drawing zone lines).[10] The Supreme Court has never ruled whether it accepts this line of reasoning.

On December 6, 1976, the Supreme Court vacated the Fifth Circuit's decision and, without opinion, remanded the case to that appeals court "for reconsideration in light of Washington v. Davis." Austin Independent School District v. United States, 97 S.Ct. 517 (1976).[11]

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[10] The court of appeals also held the desegregation plan to be ineffective as to black children--an issue independent of the matter of intent to segregate Mexican-American children. The plan included sixth grade centers, two minority assistant principals, majority to minority transfers, and some boundary changes. The court of appeals noted that no practicality barring further remedy had been given, save a vague assertion of the undesirability of busing children under ten years of age. But such a sweeping limitation ignores Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971), which held busing to be one permissible remedial tool, if it did not "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-1. The implication of Swann is that the burden is on school authorities to prove the risk since "[b]us transportation has been an integral part of the public education system for years. . ." 402 U.S. at 29.

[11] In its briefs filed with the Supreme Court, the United States Department of Justice had agreed that if the Fifth Circuit opinion was read to mean that a school board had a constitutional duty to correct racial imbalance occurring because of a neighborhood school policy intended to be racially neutral, then that opinion was in error. However, it argued that the record contained evidence that other devices were used in a discriminatory manner against Mexican-Americans as well as blacks, and it urged the Supreme Court to remand for further consideration in light of Washington v. Davis. Brief for the United States at 13. That is what the Supreme Court did. On remand the Fifth Circuit Court of Appeals reaffirmed its earlier determination that the facts constitute intentional districtwide segregation, but did not rely solely on the "natural and foreseeable consequences" standard. 564 F.2d 162 (5th Cir. 1977). The court of appeals therefore remanded to the district court for a remedy, ordering the court to consider the interaction of school practices on housing segregation. The burden is on the school district to show residential segregation is unrelated to school practices.

Although there was no opinion issued by the Court in Austin, three justices joined in a concurring opinion authored by Justice Lewis Powell. That concurring opinion, which was widely quoted in the news media and was often incorrectly identified as the Court's opinion, suggested a restrictive view of the scope of permissible desegregation remedies. The three justices stated:

> [t]here is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan [mandated by the court of appeals]. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court. . . .[L]arge scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. 97 S.Ct. at 519.

At that time, there was substantial concern among civil rights leaders about whether the views expressed by Justice Powell (with the Chief Justice and Justice Rehnquist) might be shared by a majority on the Court. Subsequent decisions by the Court suggest that there is majority agreement at least to require district and court of appeals judges to be more meticulous in describing how the facts in each particular case support the liability finding or desegregation order in accordance with existing constitutional and legal standards.[12] On March 23, 1977, the Department of Justice submitted a new brief to the court of appeals charging deliberate segregation of Mexican-American children.

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[12] For a discussion of those elements of this opinion of Justice Powell that were adopted by the court, see page 15, on the Dayton case. The three Justices devoted most of the opinion to a discussion of remedies (not relevant to the issue of intent, which bears on the finding of a violation), and implied a rejection of large portions of the Green decision of 1968 (discussed on p.3) which requires that remedies must effectively eliminate racially identifiable schools to dismantle a dual system; the Keyes decision of 1973, which holds that a systemwide violation may be found where intentional segregation has been proven in a substantial portion of the district; and the Swann decision of 1971, which held busing to be a legitimate remedy for unconstitutional segregation and racial ratios to be an acceptable starting point, although not an inflexible requirement for fashioning a remedy. Green, Swann, and Keyes seem to remain intact.

Arlington Heights: Further Words on How to Prove Intent

The constitutional standard, as set forth in Washington v. Davis and Keyes, that a violation of the equal protection clause requires proof of discriminatory purpose or intent, was addressed next in a zoning case, not a school desegregation case. That was Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S.Ct. 555 (1977), decided by the Supreme Court on January 11, 1977.

The Metropolitan Housing Development Corporation (MHDC) applied in 1971 for rezoning of a 15-acre parcel from single-family to a multiple-family classification. The Village of Arlington Heights, Illinois (a suburb of Chicago), refused the request. MHDC, which planned a low-income, racially integrated development for the site, filed suit alleging that the refusal violated the constitutional rights of potential black residents of the development. The district court ruled in favor of the village, but the Seventh Circuit Court of Appeals[13] reversed, finding that the "ultimate effect" of the denial was racially discriminatory and, therefore, the refusal to rezone violated the 14th amendment, even if the motives for denial were unbiased.

On review, the Supreme Court reversed again, stating,

> Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause.[14] Although some contrary indications may be drawn from some of our cases, the holding in Davis reaffirmed a principle well established in a variety of contexts. E.g., Keyes v. School District No. 1. . . . 97 S. Ct. at 563.

The Court said that since both the trial court and the appeals court had found no racially discriminatory purpose in the refusal to rezone, there was no constitutional violation. The Court, with the concurrence of seven justices, then sought to provide some guidance for lower courts on how to determine whether the prohibited discriminatory intent is present:

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[13] The Seventh Circuit has jurisdiction over cases arising in Wisconsin, Illinois, and Indiana.

[14] On remand the U.S. Court of Appeals for the Seventh Circuit held that violations of the Fair Housing Act might be established by a showing of discriminatory effect, without a showing of discriminatory intent, 558 F.2d 1283 (7th Cir. 1977). This holding is consistent with past Supreme Court decisions that give great weight to the interpretation given to a statute by the agencies designated by the Congress to carry out the legislative purpose. See, for example, Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 (1972) (housing), and Griggs v. Duke Power Company, 401 U.S. 424 (1971) (employment).

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action--whether it "bears more heavily on one race than another," Washington v. Davis, 426 U.S., at 242--may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's purposes. For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
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> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.
>
> The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. 97 S.Ct. at 564-65 (emphasis added) (citations omitted).

The inquiry involves weighing nonracial reasons that may be offered to explain the challenged action. However, the mere existence of nonracial reasons does not necessarily negate a finding of a racial intent, for "rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." 97 S.Ct. at 563.

Such a "sensitive inquiry" would then seem to be a mandatory part of the initial decision of any district court in a school desegregation case as well. Two weeks after deciding the Arlington Heights case, the Supreme Court vacated a metropolitan school desegregation order for Indianapolis. In doing so, the Court cited Washington v. Davis and Arlington Heights and remanded the case to the Seventh Circuit for further consideration. Bd. of School Comm'rs of Indianapolis v. Buckley, 97 S.Ct. 802 (1977).

Indianapolis: Where Do Metropolitan Plans Stand in the North?

The Indianapolis school system was initially found to have been responsible for unconstitutional segregation in 1971 due to gerrymandering of attendance zones, segregation of faculty, use of optional zones, discriminatory school construction, site selection, and feeder patterns. United States v. Board of School Comm'rs of Indianapolis, 332 F.Supp. 655 (S.D. Ind. 1971), aff'd, 474 F.2d 81 (7th Cir. 1973), cert. denied, 413 U.S. 920 (1973).

In 1971 the court permitted the Buckley plaintiffs, representing a class of black school children, to enter the case as intervenors and ordered the addition of the State of Indiana and school districts in the entire metropolitan area, as defendants, to consider the appropriateness of a metropolitan remedy. After two more trips to the Seventh Circuit Court of Appeals, the district court's desegregation order including the suburbs was finally upheld by that court. United States v. Bd. of School Cmm'rs of Indianapolis, 541 F.2d 1211 (7th Cir. 1976).

The trial court's order and the Seventh Circuit's affirmance were based on several determinations. First, the State's creation of Uni-Gov, a countywide government supplanting, for many services, previous Indianapolis and suburban city governments but not including the separate school systems of Indianapolis or the suburbs, was viewed as violative of the Constitution especially in light of other actions to prevent expansion of the school district with extension of the city's boundaries. Second, all low-income public housing was confined to the inner city. The appeals court said, "The record fails to show any compelling state interest that would have justified the failure to include [Indianapolis public schools] in the Uni-Gov legislation." 541 F.2d at 1220. Admitting that there were legitimate considerations of taxes and citizen participation in excluding schools from Uni-Gov, the court nonetheless said:

> These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. 541 F.2d at 1221.

The court drew inferences of intent from an array of facts, noting that everyone was aware that 95 percent of blacks in Marion County lived in the inner city and that a school case was pending in Federal court.

As to housing, the court found that all public housing projects for families (in which 98 percent of the residents were black) were restricted to the inner city of Indianapolis. The suburbs resisted building any public housing outside the city, and this substantially affected the disparate racial composition of the schools in the city and suburbs. Pending the outcome of appeals of the metropolitan issues, the Indianapolis Public School System is implementing an order to desegregate within the city, under a plan meeting the court's guidelines.

The dissenting judge on the Seventh Circuit panel said that the majority had not properly understood and followed Washington v. Davis. The Supreme Court may have agreed, as it vacated the appeals court's judgment without an explanatory opinion, merely citing both Washington v. Davis and Arlington Heights. 97 S.Ct. 802 (1977).[15]

Dayton: Did it Modify Keyes?

The two major substantive school desegregation decisions rendered by the Supreme Court waited until virtually the end of the 1976-77 term. Both the Dayton and the Detroit cases were decided on June 27, 1977.

Like many other school desegregation cases, Dayton Bd. of Education v. Brinkman[16] has a long history. Originally filed on April 17, 1972, by parents of black students in the Dayton public schools, the initial finding of de jure segregation was made by District Judge Carl Rubin in February of 1973. The liability finding was based upon Judge Rubin's finding that (1) the schools were racially unbalanced, (2) two high school optional attendance zones had had

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[15] On remand, the United States argued to the Seventh Circuit that the factual findings did not support an interdistrict desegregation order under the Davis and Arlington Heights standards, but that a voluntary transfer plan between Indianapolis and the suburbs would be appropriate. Brief for the United States at 25. The Buckley intervenors continue to press for a finding of intentional segregation by the state and suburbs to justify the interdistrict remedy. It will be recalled that Davis and Arlington Heights do not require that racial discrimination be the sole, primary, or principal motivating factor, merely that it have been "a motivating factor." See p.13. On June 2, 1978, Judge S. Hugh Dillin again ordered an interdistrict remedy, although he has not yet ruled on the issue of intent.

[16] The case is known in the lower courts as Brinkman v. Gilligan because John Gilligan was governor at the time the case was filed, and he was the first named of several defendants. The Dayton Board of Education petitioned to take the case to the Supreme Court, so its name is attached to the case at that level.

"demonstrable racial effects in the past," and (3) the current school board had rescinded a previous board's resolution accepting responsibility for segregation. He concluded that these three sets of facts were "cumulatively a violation of the Equal Protection Clause."

In July 1973 the district court approved the school board's proposed desegregation plan for some magnet schools and no transportation. The Sixth Circuit Court of Appeals,[17] however, while affirming the finding of liability, reversed and remanded as to the remedy, contending it was too limited. 503 F.2d 684 (6th Cir. 1974). In March 1975 the district court approved a more expansive plan for more magnet schools and the closing of an all-black high school, but again the plan was rejected; this time the Sixth Circuit directed the lower court to "adopt a system-wide plan for the 1976-77 school year. . . ." 518 F.2d 853 (6th Cir. 1975), cert. denied, 423 U.S. 1000 (1975).

A systemwide desegregation plan was ordered for Dayton's 42,000 students in March of 1976, affirmed by the appeals court, 539 F.2d 1084 (6th Cir. 1976), and put into effect for the 1976-77 school year as ordered.[18] On June 27, 1977, the Supreme Court in an 8-0 decision vacated the judgment and remanded the case for further proceedings because the findings of the lower courts did not justify a systemwide desegregation plan for Dayton. 97 S.Ct. 2766 (1977).

In ruling on the substantive issues presented, the Supreme Court also delivered a scolding to the Sixth Circuit by saying, "[W]e think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." 97 S.Ct. at 2770. The Court continued in professorial fashion:

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[17] The Sixth Circuit has jurisdiction over Federal cases arising in Michigan, Kentucky, Tennessee, and Ohio.

[18] The plan, partially designed by Professor John A. Finger, Jr., required that the racial distribution of students in each school in the district be brought within 15 percent of the 48-52 percent black-white population ratio of the Dayton schools. It entails pairing of elementary schools, rezoning, and use of magnet schools. Transportation was limited to no more than 20 minutes or 2 miles, whichever was less. In fact, some 20,000 students were transported in 1976-77, about half of these for purposes of desegregation. (Most of the school transportation in the Nation, of course, is provided for reasons other than desegregation.)

> On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them. . . .If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court has afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law. 97 S.Ct. at 2774.

The Court's opinion treated two separate major issues, first, the standard for determining the existence of a constitutional violation, and, second, the standard for deciding the scope of the remedy. As to the first, the Court did not depart at all from its previous standards.

Even prior to examining the desegregation plan under review, the Court commented skeptically on the underpinnings of the original liability finding:

> The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. The District Court's finding as to the optional attendance zones for the three Dayton high schools, assuming that it was a violation of the standards of Washington v. Davis, appears to be so only with respect to high school districting. The District Court's conclusion that the Board's recision of previously adopted school board resolutions was itself a constitutional violation is also of questionable validity. 97 S.Ct. at 2772 (citations omitted).

In other words, following the standards laid down in previous cases, the Court reiterated that racial imbalance alone is not unconstitutional. Nor is recision of an unimplemented voluntary plan of itself a violation. If the optional attendance zones were a violation, they did not have sufficiently wide an impact to justify a systemwide remedy.

While the Supreme Court said it was "clear that the presently mandated remedy cannot stand upon the basis of the violations found," it considered that, because of the confusion evident in the opinions of the lower courts as to the applicable principles and appropriate relief, the case should return to the district court "for the making of more specific findings and, if necessary, the taking of additional evidence." 97 S.Ct. at 2775. The duty of the district court and Sixth Circuit, said the Supreme Court, is:

> to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . .If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when the distribution is compared to what it would have been in the absence of such constitutional violations. 97 S.Ct. at 2775.

The Court added that a systemwide remedy is permissible only if there has been a systemwide impact from the violations. The Court directed, however, that the existing Dayton desegregation plan remain in effect for the coming school year "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion." 97 S.Ct. at 2776.[19]

If it was not clear to the lower Federal courts prior to Dayton, it is abundantly plain now that the Supreme Court demands detailed findings of fact in the liability decision, including a careful analysis of the "incremental segregative effect" caused by any constitutional violations found. The extent of the "incremental segregative effect" determines the proper extent of the remedy.

While the emphasis may be new, the concept is not. In Keyes (Denver), the Court stated:

> . . .a finding of intentionally segregative school board actions in a meaningful portion of a school system. . .creates a presumption that other segregated schooling within the system is not adventitious. . . . 413 U.S. 189 at 208.

The burden is then on the school board to prove that the other schools were not intentionally segregated. The Court in Keyes added that

> . . .common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions. . .(413 U.S. at 203),

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[19] Following the remand, District Judge Rubin held further hearings. On December 15, 1977, he ruled that the evidence did not justify a systemwide remedy and ordered that the case be dismissed. The Dayton Board of Education then voted to return to a "freedom of choice" approach. Families could decide to send children to neighborhood schools, rather than schools designated under the desegregation plan. However, on January 16, 1978, the court of appeals temporarily blocked that order, so the plan will remain in full effect pending appeals by the National Association for the Advancement of Colored People (NAACP).

and

> plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. 413 U.S. at 207.

The Court said a finding of intentional segregation in one part of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system (413 U.S. at 209). A prima facie case,[20] created by findings of constitutional violations in a substantial part of a school district, might be rebutted "by evidence supporting a finding that a lesser degree of segregated schooling. . .would not have resulted even if the Board had not acted as it did."

In Dayton the lower courts had not found violations in a meaningful or substantial portion of the system to trigger the Keyes presumption. Thus, a systemwide remedy was unjustified.

For an appellate court to evaluate properly a desegregation plan ordered by a lower court, there must be a liability decision that clearly sets forth what the position of students would have been absent constitutional violations.[21] Dayton, 97 S.Ct. at 2775. Without such a foundation, it would be difficult if not impossible to determine whether the desegregation plan ordered either exceeded or fell short of correcting the effect of the violations. The Supreme Court on numerous occasions has pointed out that:

> [There are] fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary. It "may be exercised 'only on the basis of the constitutional violation.' " Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Hills v. Gautreaux, 96 S.Ct. 1538 at 1544 (1976) (citations omitted).

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[20] A prima facie case is a presentation of alleged facts by the plaintiff that, if proven and not refuted by the defendant, will win the case for the plaintiff.

[21] It is not at all clear what kind of evidence is necessary to make the comparison necessary to this determination for a large, complex school system with a long history of decisionmaking, accompanied by simultaneous demographic shifts. However, under the Keyes presumption, a school board must show that the segregation it seeks to retain would have existed in the absence of a constitutional violation.

When the Court referred in Keyes to the need to prove "a current condition of segregation resulting from intentional state action," a key word was "current." The Supreme Court said in Keyes that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." 413 U.S. at 211. One of the requirements explicitly imposed on lower courts by the Dayton decision is to compare the racial distribution in the school system "as presently constituted" with what it "would have been" in the absence of constitutional violations. In its 1974 Detroit decision, the Supreme Court said the objective is "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such [unconstitutional] conduct." Milliken v. Bradley, 418 U.S. 717 at 746 (1974) (Milliken I).

If the violations described by a district court had a transitory effect, with no measurable impact on the school system as it exists today, then under Keyes, Milliken I, and Dayton they are inadequate to justify any Federal judicial intervention. For example, if in 1955 students from an overcrowded black school were bused past white schools having excess capacity to attend another predominantly black school, and if that busing program terminated after one school year, then even though the decision by school officials to operate such a busing plan would have been in violation of the Constitution, it would be difficult to contend that that particular decision has any continuing segregatory effect today. That constitutional violation could not now be the basis for a remedial desegregation order.

Of course, actions taken in the past may be relevant to determining the intent behind more recent actions even if the segregatory effect of the past actions has long since vanished. Arlington Heights, 97 S.Ct. at 564, and Keyes, 413 U.S. at 207. Therefore, it is necessary that a district judge clearly distinguish between those historical events used solely to assist the court in determining the intent of subsequent acts and those events which are regarded as having a continuing segregative impact today.

It should be noted, however, that the Supreme Court in its Dayton decision did not discuss the so-called Keyes presumption as a basis for ordering a systemwide remedy. That point fairly obviously was not relevant to the extremely limited violations found by the Dayton district court.[22] The Court

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[22] The court of appeals hinted that further violations had been entered in the records of the district court as to discriminatory staff assignments, school construction, grade structure and organization, and transfer and transportation policies. However, the district court did not find the evidence persuasive, and the court of appeals improperly failed to rule on the factual matters argued by the plaintiffs. On remand from the Supreme Court, the district court again found the evidence unpersuasive and dismissed the case. The NAACP, on appeal, has urged the Sixth Circuit to reject the district court's findings of fact as contrary to the evidence. An appellant making such an argument has a heavy burden, for all the legal presumptions favor upholding the fact findings of the trial judge as correct. (See page 2.)

did, though, cite Keyes, Swann, and other earlier school cases in reaffirming that "[t]here is no doubt that federal courts have authority to grant appropriate relief of this sort [a systemwide desegregation order] when constitutional violations on the part of school officials are proven." 97 S.Ct. at 2770.[23]

Detroit: The State Role in Undoing the Effects of Discrimination

When the Detroit school desegregation case reached the Supreme Court in 1977, it was the second time that the Court had reviewed that litigation, which began in August 1970. In Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I), the Court ruled that an interdistrict remedy for de jure segregation in the

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[23] One commentator has noted, "the direction taken by the Court in the Dayton case seems unfortunate. Ordinarily Federal courts, as courts of equity, have considerable discretion in fashioning a remedy for a wrong. In school desegregation cases, they have taken into account evidence that a plan involving all schools in the district may be more stable and acceptable to the community because it distributes the white and black school population fairly evenly and does not leave ready havens for white flight. Courts have also taken into account, at least implicitly, the question of how well a particular plan accords with the findings of social scientists on educational issues, e.g., the finding that classrooms consisting largely of advantaged children provide a better educational environment for low income children.

"While Dayton does not exclude these considerations, it moves toward a more legalistic and mechanistic set of guidelines for remedy. It will be ironic if those who resist busing remedies on grounds that 'government ought to be concerned with education as a whole not just integration' succeed in having the courts read educational factors out of desegregation remedies." Taylor, "The Supreme Court and Recent School Desegregation Cases," Law and Contemporary Problems, forthcoming (footnote omitted). But see, Milliken v. Bradley, 97 S.Ct. 2749 (Milliken II) to be discussed next.

Detroit school system exceeded the constitutional violation.[24] It remanded the case to the district court for further appropriate action, including formulation of an acceptable Detroit-only desegregation decree.

The latest desegregation order issued by the district court contained, in addition to student assignments, requirements for special programs in the areas of reading, inservice teacher training, testing, and counseling. It also required that the cost of programs be shared equally by the Detroit board and the Michigan State defendants (principally the State Board of Education).[25]

The Detroit board had proposed a plan that included 13 "educational components."[26] The district court (Judge Robert E. DeMascio) conducted extensive hearings over a period of 2 months before approving, in principle, the inclusion of such components in a court-ordered desegregation plan. The court said:

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[24]The district court's original liability findings of 1971 were affirmed by the Sixth Circuit, 484 F.2d 215 (6th Cir. 1973) and were never challenged in the Supreme Court. Local constitutional violations cited in the late Judge Stephen J. Roth's opinion, 338 F.Supp. 582 at 587-9 (E.D. Mich. 1971), included the improper creation and alteration of attendance zones, selection of sites for new schools so that most schools opened as predominantly one race, improper use of optional zones, racially based transportation policies (busing black pupils to predominantly black schools that were beyond white schools with available space), discriminatory grade structure, and feeder school patterns. Violations by the State of Michigan included passage of a law to forbid Detroit from voluntarily desegregating, approval of local school site selection, and providing transportation for white suburban schools but not for Detroit.

While the district court found that Detroit's schools were segregated due to governmental action, there was no finding that the differing racial composition of city and suburbs was the result of state action; nor was there a showing of discriminatory action by suburban districts. Under these circumstances, the Supreme Court found an interdistrict remedy was not justified: "absent an interdistrict violation, there is no basis for an interdistrict remedy. . . ."418 U.S. at 752.

[25]In addition to the State Board of Education, the other State defendants are the Governor, the Attorney General, the State Superintendent of Public Instruction, and the State Treasurer.

[26]These included vocational centers, a uniform code of conduct and fair procedures, programs for school-community relations and parent involvement, curriculum design, bilingual education, multiethnic curriculum, cocurricular activities with artistic and educational institutions, and a mechanism for monitoring the plan.

> While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. Bradley v. Milliken, 402 F. Supp. 1096 at 1118 (E.D. Mich. 1975).

The district court specifically found that the testing and counseling components were directly necessary because those programs, as then administered, were infected with the discriminatory bias of a segregated school system. Id. It also specifically found that remedial reading and inservice teacher training are "essential" to a successful desegregation effort. Id. It ordered implementation of programs in these four areas, but it left wide discretion with the school board to determine the contents.

The Sixth Circuit upheld both the educational components and the cost-sharing features of the district court's order, although it ordered the case remanded for failure to include three of Detroit's eight regions in the pupil reassignment provisions. 540 F.2d 299 (6th Cir. 1976).[27]

The State defendants (but not the Detroit School Board) petitioned for Supreme Court review of only two issues: (1) the inclusion of the four educational programs and (2) the requirement that the State bear one-half the cost of those programs. On June 27, 1977, the Supreme Court affirmed the lower court decisions on both those issues.[28]

In its decision, 97 S.Ct. 2749 (1977) (Milliken II), the Supreme Court said that when a Federal court is fashioning a remedy, it should focus on three factors:

1. The remedy must be related to the condition alleged to offend the Constitution;

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[27] Ninety percent of the students in the three omitted regions are black. Detroit's schools serve almost a quarter of a million students, of whom 75 percent are black. Fewer than 10 percent of the students are bused under the plan. Plaintiffs have been granted permission to file a second amended complaint to allege interdistrict violations, in an effort to obtain a metropolitan areawide remedy, which is still the only way to desegregate the inner city, according to the court of appeals, 540 F.2d at 240.

[28] In so doing, the Court noted that it had never before specifically addressed the question of including remedial education programs in school desegregation decrees. 97 S.Ct. at 2756.

2. The decree "must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'" (97 S.Ct. at 2757, the Court quoting from Milliken I); and

3. The court "must take into account the interests of State and local authorities in managing their own affairs, consistent with the Constitution." Id.

The Court found that the four educational features proposed by the Detroit board and included in the district court's order were amply supported under those three criteria. Rejecting the State defendants' assertion that the Detroit remedy must be limited to pupil reassignment, the Court said:

> These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial segregation. 97 S.Ct. at 2758.

The Supreme Court went on to cite a long list of lower courts that, over the years since Brown I, had included remedial educational programs in desegregation orders. The Court said, "Our reference to these cases is not to be taken as necessarily approving holdings not reviewed by this Court. However, they demonstrate that the District Court in the case now before us did not break new ground in approving the School Board's proposed plan." 97 S.Ct. at 2760.

The Court pointed out, however, that approval of educational features for a Detroit desegregation plan did not mean that such elements would always be proper elsewhere. "On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation." 97 S.Ct. 2761.[29]

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[29] The district court had ordered that the faculty of no school should be more than 75 percent of any race. The Detroit Federation of Teachers and the State argued that in so doing the court exceeded its authority because there was no finding of discrimination as to faculty. The Board of Education and the plaintiffs for their part, argued that the faculty ratio should be 50-50 to be in compliance with Federal regulations under the Emergency School Aid Act. The court of appeals said that reassignment of faculty was necessary to mitigate the effects of keeping some schools entirely racially isolated, and if otherwise feasible, it is also desirable for the court to ensure that the system is in compliance with Federal regulations. The case was remanded to the district court for more evidence on the proper standard for desegregating faculty, which was not before the Supreme Court. The Court nevertheless noted its past holdings that desegregation of staff is part of achieving a school system free from racial discrimination. (No particular racial ratios are implied, however.) 97 S.Ct. 2758, citing United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

Milwaukee: Applying Dayton

The course of the litigation seeking to desegregate Milwaukee, Wisconsin, schools is unusual in several ways. First, the name of the lawsuit has changed several times as plaintiff students and defendant members of the school board came and went from 1965 to 1977. A second unusual feature in the Milwaukee case is that the plaintiffs consist of two classes. As in most such cases, a group of black children represents a class of all the black students enrolled or to be enrolled in the Milwaukee schools. But, atypically, the district court also certified a class consisting of all the nonblack pupils enrolled or to be enrolled in Milwaukee schools, represented by three nonblack children who are also named plaintiffs in the suit. A third unusual feature of the Milwaukee case is that it reached the Supreme Court on the question of liability. All other school desegregation cases reviewed by the Court during the 1976-77 term involved the question of remedy. This occurred only because the defendants decided to appeal the finding of liability, despite the fact that the Supreme Court has never reversed a finding of school board liability in a desegregation case.

The original lawsuit began in 1965, and the amended complaint upon which the case went to trial was filed March 28, 1968. The trial opened in September 1973 and was concluded on January 31, 1974. Chief Judge John W. Reynolds then ordered the defendants to submit proposed findings, which were to be commented upon by the plaintiffs. That process, along with the filing of posttrial briefs, was completed in December 1974. Thirteen months later, in January 1976, Judge Reynolds released his decision finding that the Milwaukee public school system was unconstitutionally segregated. Amos v. Board of School Directors of City of Milwaukee, 408 F.Supp. 765 (E.D. Wisc. 1976). He also certified his liability ruling for immediate appeal while desegregation plans were being developed.

In its finding of liability, the district court held that, "the Board has consistently and uniformly adhered to a 'neighborhood school policy,' first developed in 1919." Id. at 780. However, the board and administration

> acted with the knowledge that the total effect of their actions in furtherance of that policy would be the segregation of black and white students in separate schools. . .because there was general knowledge as to the racial characteristics of neighborhoods affected by such decisions. . .[and] alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students non-white. Id. at 788.

> [T]he Board knew that adherence to the neighborhood school policy would result in a high proportion of racially imbalanced schools but believed, in good faith, that such a policy would produce the best possible educational opportunities for all students in the system, regardless of race. Id. at 808.

Citing for authority the Eighth Circuit Court of Appeals opinion in the Omaha case,[30] the court held that even though the school board had not been motivated by any desire "to discriminate against or otherwise 'shortchange' black students," Id. at 810, yet:

> [The] Court concludes that the school authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools. Id. at 818.

Judge Reynolds claimed that he did not rely on the devices used in the Austin, Omaha, Coney Island, and Kalamazoo cases,[31] by which intent was inferred from allegedly neutral actions with natural, probable, and foreseeable consequences of bringing about or maintaining segregation. Nevertheless, he cited those cases and added that the school board intentionally created and maintained a segregated school system by acting knowingly. He noted that the "Board has been concerned about" the racial effect of the neighborhood school policy "and has often discussed and considered racial changes in the system's schools." Id. at 808. Moreover, the Superintendent of Education and Assistant Superintendent testified that the board and administration were:

> unalterably opposed to any form of forced integration [and have never] in any significant way knowingly cooperated with any policy, program, or law, either federal or state, which had as its objective the integration of the races. 408 F.Supp. at 819.

Further, the court mentions,

> school authorities constantly alleged throughout this case that certain characteristics of black school children make their separation from other children "reasonably necessary and desirable from an educational point of view"[to achieve quality education]. Id. at 822.

Specific violations cited by the district court included discriminatory assignment of teachers, additions to black schools, and boundary changes that confined and contained black pupil populations, and the busing of black classes

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[30] United States v. School District of Omaha, 521 F.2d 530 (8th Cir. 1975), vacated, 97 S.Ct. 2905 (1977), discussed at page 28, of this booklet.

[31] U.S. v. Texas, 532 F.2d 380 (5th Cir. 1976), discussed on p.8; U.S. v. School District of Omaha, 521 F.2d 530 (8th Cir. 1975), discussed on p. 28; Hart v. Community School Bd. of Ed., N.Y. School Dist. #21, 512 F.2d 37 (2d Cir. 1975); Oliver v. Michigan State Board of Education, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975).

intact to "white" schools, where they were kept separate. While acknowledging that for each allegation the school officials had presented a racially neutral explanation, the district court went on to explain:

> These and similar explanations on an isolated basis seem reasonable and at times educationally necessary. In and of itself, any one act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. These acts, previously described in detail, constituted a consistent deliberate policy of racial isolation and segregation for a period of twenty years. It is hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration. Id. at 819.

The school officials appealed to the Seventh Circuit Court of Appeals, which affirmed the ruling of the district court and rejected the defendants' argument that the black schools would have been predominantly black irrespective of the unconstitutional actions found by the trial court. The appeals court stated:

> As we said in Indianapolis I,"it would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the presumption of inevitability." Armstrong v. Brennan, 539 F.2d 625 at 637 (7th Cir. 1976).

The defendant school board members petitioned to have the case reviewed. The Supreme Court granted the petition, vacated the ruling of the court of appeals, and sent the case back to the lower court for reconsideration in light of the Supreme Court decisions in the Arlington Heights and Dayton cases. Brennan v. Armstrong, 97 S.Ct. 2907 (1977). The Court, in its per curiam opinion, called for more explicit findings on the scope of the violation, stating:

> The Court of Appeals, observing that there was "an unexplained hiatus between specific findings of fact and conclusory findings of segregat(ive) intent," stated that the District Court is "entitled to a presumption on consistency" and concluded that the findings of the District Court were not clearly erroneous. Neither the District Court. . .nor the Court of Appeals. . .addressed itself to the inquiry mandated by our opinion in [the Dayton case], in which we said:
>
> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when the distribution is compared to what it would have been in the absence of such constitutional violations. . . ." 97 S.Ct. at 2907.

Like the Supreme Court's decision in the Omaha case, Milwaukee was decided by a divided Court, with Justices William Brennan and Thurgood Marshall joining in a dissenting opinion written by Justice John Paul Stevens. In that dissent, Justice Stevens pointed out that "it is quite clear that after respectful reconsideration the Court of Appeals remains free to re-enter its original judgment." Id. at 2908. The dissenters argued that Dayton, a case involving the proper scope of a remedy, had no application to the review of a liability decision[32] and that the lower court had already properly construed Washington v. Davis, which set forth the same principle as to intent that was applied later in Arlington Heights. Id. The trial court had found intentional segregation with systemwide impact.

The Milwaukee school desegregation plan (which was not a part of the case at the time of the 1977 review by the Supreme Court) was developed with citizen involvement through a Committee of 100, under the guidance of court-appointed Special Master John A. Gronouski, who was also asked to supervise implementation. By September 1977, almost two-thirds of the schools were within the guidelines set by the Master's report: 25-45 percent black student enrollment, and 11-21 percent black faculty. Since the plan has thus far been based largely on voluntary transfers to "magnet schools"--career-oriented high schools, and specialty elementary schools--the test of the effectiveness of magnet schools for desegregation purposes will come when Phase III is implemented.[33]

Omaha: Applying Dayton

On August 10, 1973, the United States filed suit against the School District of Omaha, its Superintendent, and members of the district's Board of Education alleging violations of Title IV of the Civil Rights Act of 1964 and the 14th amendment to the U.S. Constitution. The defendants denied the allegations, contending that the Omaha schools were being operated in a racially neutral manner.

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[32] Of course, the dissent here ignores that aspect of the Dayton opinion dealing with the duty of the lower courts to make fact findings sufficiently detailed to enable an eventual determination as to the proper scope of remedy. See Dayton Bd. of Ed. v. Brinkman, 97 S.Ct. 2766 (1977) and the discussion at page 15. The Supreme Court normally does not review the accuracy of findings of fact that a court of appeals has determined to be supported by the record. However, it may require that the district court supply findings of fact with sufficient specificity, and it reviews the legal significance of the facts.

[33] After the Supreme Court remanded the case to the Seventh Circuit, the court of appeals remanded to the district court, which held new hearings on the issue of intent, and again found deliberate segregation. Meanwhile the Special Master's office has been closed, and planning for Phase III has been suspended.

An initial motion by the United States for a preliminary injunction was denied. 367 F.Supp. 179 (D. Neb. 1973). Thereafter, a group of black students and their parents intervened as plaintiffs representing a class composed of all black Omaha students and their parents. 367 F.Supp. 198 (D. Neb. 1973).

The trial was brief, as school desegregation cases go, beginning on March 4 and concluding on March 20, 1974. 389 F.Supp. 293 (D. Neb. 1974). As in other Northern cities, Omaha public school segregation was never mandated by statute, so the issues were (1) whether the schools were segregated, and, if so, (2) whether that condition had been caused or maintained by intentional state action.

The school district, consisting of about 60,500 students of whom 20 percent are black, includes most of the city of Omaha and part of Sarpy County. There was no dispute that the school system was in fact segregated, both as to students and faculty. Dispute arose only over the issue of intent.

On October 15, 1974, District Court Judge Albert G. Schatz ruled that the evidence presented did not justify a finding of intentional discrimination and he dismissed the lawsuit. Id. The district court's opinion reviewed evidence concerning the alteration of elementary attendance zones, handling of overcapacity enrollments, creation of junior high schools in the 1950's, use of optional attendance zones, special transfers, faculty hiring and assignment, construction of new schools, and relationships to racial patterns in housing.

In each area, the trial court either found no segregative effect or found that the plaintiffs failed to present evidence sufficiently persuasive to meet the burden required by Keyes of proving "an intentionally segregative policy practiced in a meaningful or significant portion of the school system." 389 F.Supp. at 305. Absent such evidence, said the district court, the burden does not shift to the school officials to prove that their actions were not motivated by discriminatory intent. Id. Judge Schatz added:

> From all the evidence before it, and from reviewing the many cases dealing with the segregation problem, this Court is convinced that this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority students practicing a deliberate policy of racial segregation. Without such a finding, the law does not require that a school system developed on the neighborhood plan, honestly and conscientiously framed and administered, without intention or purpose to discriminate racially, must be set aside or abandoned because a racial imbalance in certain schools sometimes is the result. Id. at 322.

The United States and the intervening plaintiffs appealed the dismissal ruling to the United States Court of Appeals for the Eighth Circuit.[34] That court reversed the ruling of the trial court and held that the evidence was sufficient to create a presumption of segregative intent in five areas, ruled that there was no evidence in the record to rebut that presumption, and that therefore "the segregation in the Omaha public schools violates the Constitution and must be 'eliminated root and branch.' " 521 F.2d 530, 537 (8th Cir. 1975).

According to the court of appeals, the evidence indicated not only that the segregative effects were foreseeable but also that the school board had conscious knowledge of the likelihood of a segregated faculty, the segregative effect of site selection for new schools, and the deterioration of one high school that was 96 percent black. 521 F.2d at 535, n. 8. Segregative actions also included transfer policies requiring students to provide their own transportation and to be at the achievement level of the receiving school. Optional attendance zones were provided in neighborhoods that were residentially in racial transition.[35]

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[34] The Eighth Circuit has jurisdiction over Federal cases arising in North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas.

[35] Discriminatory housing policies did not serve as grounds for the decision. The court said they provided an alternative, however, following precedents in other circuits (that are therefore not legally binding in the Eighth Circuit) that attendance zones cannot be imposed on intentional residential discrimination, public or private. According to the court of appeals, significant housing facts were:

- Housing in the Near North Side of Omaha was segregated partly due to actions of the Omaha Housing Authority.
- Racial covenants were recorded in deeds, even after 1948 when the Supreme Court declared them unenforceable.
- In 1953 the State Board of Realtors promulgated a Code of Ethics that favored one-race neighborhoods.
- In 1960 sellers were allowed to cross out an antidiscrimination clause in sales agreements.
- From 1963-65 sellers could include in multiple listings the word "conditions" to indicate "white only." More than one-third of the listings were so designated. 521 F.2d at 534-5.

The court of appeals went on to explain that, in its view, the trial court had failed to recognize properly how the "presumption" of intent related to the evidence. Under the proper legal standard, said the appeals court, "a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequences of which is to bring about or maintain segregation." 521 F.2d at 535-36.

The court of appeals then ordered the case sent back to the trial court with instructions to develop a systemwide desegregation plan to be fully implemented by the 1976-77 school term. The faculty was required to be integrated by 1975-76. Under the plan, no school was to have a black enrollment greater than 35 percent, and any school at present having a black enrollment between 5 percent and 35 percent would be left alone. 521 F.2d at 547. The U.S. Supreme Court declined at that time to review the appeals court decision, 423 U.S. 946 (1975), so the case went back to Judge Schatz for the development of a remedy.

The Omaha Board of Education submitted a systemwide desegregation plan[36] on December 31, 1975. After public hearings and several changes, the trial court approved the plan on April 27, 1976, and incorporated it as part of the desegregation order. 418 F.Supp. 22 (D. Neb. 1976). The judge commented, with respect to the process of developing the plan:

> It should be noted, at the outset, that all the parties herein, and the Board of Education and its Task Force, have gone about the assignment of formulating a student integration plan with exemplary good faith, cooperation and sincere efforts to resolve the problem. An adversary approach has been minimal. 418 F.Supp. at 23-24.

The court also expressed high praise for a court-apointed Interracial Committee that had worked with the parties and the court in developing the plan. Id. at 24, n. 2.

After the plan was ordered, the plaintiff class of black students appealed, saying the plan was inadequate; it did not go far enough. The school defendants also appealed, saying the plan was beyond the powers of the court; it went too far. The court of appeals upheld the lower court's desegregation plan--it was legally justified--on August 24, 1976. 541 F.2d 708 (8th Cir. 1976).

The plan, which was implemented September 1976, included such desegregation tools previously approved by the Supreme Court as rezoning, magnets, new feeder patterns, and transfers promoting racial balance. Plans for school construction, additions, and closings were to be submitted to the court, which would retain jurisdiction to ensure effective implementation. The lack of inclusion of first graders was to be reviewed in one year to see if it is

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[36] Excluding students in the first grade.

constitutional. In addition, the court ordered the development of detailed logistical plans for transportation, health, safety, security, special needs transfers, home and school communication, curriculum development, movement of equipment and instructional supplies, modification of facilities, budget, monitoring, a public acceptance program, and all attendant personnel considerations.

The defendant School District of Omaha subsequently petitioned for review by the U.S. Supreme Court. On June 29, 1977, the Supreme Court in a 6-3 per curiam opinion vacated the judgment of the Eighth Circuit Court and remanded the case for reconsideration. 97 S.Ct. 2905 (1977).

The Supreme Court, in its decision, pointed to the district court's conclusion that the plaintiffs "had not carried the burden of proving a deliberate policy of racial segregation." The Supreme Court then mentioned that while the court of appeals "generally accepted these [the district court's] fact findings [, in each instance, however, it concluded that there was sufficient evidence under the legal standard it adopted to shift the burden of proof to the [school district]." (Emphasis added.) Referring to its earlier decisions in Washington v. Davis[37] and Village of Arlington Heights v. Metropolitan Housing Development Corp.,[38] the Court said that in ordering and developing an "extensive plan involving, among other elements, the systemwide transportation of pupils," the lower courts had failed to address themselves to the inquiry required by the Dayton case, decided only two days earlier, where the Court said:

> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy. 97 S.Ct. 2905-6 (citations omitted).

Mr. Justice Brennan, in a dissent joined by Justices Marshall and Stevens, argued that the lower courts had already properly interpreted Washington v. Davis and anticipated the reasoning of Arlington Heights. He did not consider that the Dayton decision added anything new.[39]

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[37] See page 6.

[38] See page 12.

[39] In October 1977, the court of appeals ruled that the desegregation of the Omaha schools had been intentional, under the legal standard laid down by the Supreme Court, and sent the case back to the district court for a factual determination of the incremental segregative effect of the violations and the designing of an appropriate remedy. 565 F.2d 127 (8th Cir. 1977).

Some Conclusions on the 1976-77 Supreme Court Term

Of the six school desegregation cases addressed by the Supreme Court in in the 1976-77 term, all reached the Court on the petition of school board or State defendants who had lost in the courts of appeal. In five of those cases, the Supreme Court vacated the lower rulings and remanded for further actions. In one, Detroit, it affirmed the lower courts' actions. It did not reverse a single school desegregation decision. It is therefore feasible, though perhaps not likely,[40] that in each instance where there was a Supreme Court remand the lower court could, after reflection, reissue its original opinion or could reach the same decision but support it with a new opinion more clearly relating the facts of the case to the appropriate standards demanded by the Constitution and the Supreme Court.

It is important to note, as did Mr. Justice Brennan in his concurring opinion in Dayton, that:

> The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i.e., busing] when constitutional violations on the part of school officials are proven." . . .[I]t is clear from the holding in this case, and that in [Milliken II], also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired. 97 S.Ct. at 2776.

The landmark school decisions in Brown, Swann, and Keyes remain intact in their holdings that state-mandated segregation, whether by statute or by other intentional efforts of school officials, is constitutionally impermissible; and, when it is found, Federal courts continue to have broad power to order whatever remedies are necessary to eliminate all vestiges of that segregation.

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[40] See the discussion of Judge Rubin's order in the Dayton case, on page 18, which dismissed the case after remand from the Supreme Court.

PART II. CASES ON WHICH THE SUPREME COURT DID NOT RULE IN 1976-77

Louisville, Kentucky: A Metropolitan Plan Continues

The suit seeking to desegregate schools in the Louisville area began as two separate lawsuits, one against the Jefferson County school system and the other against the school district for the city of Louisville. Initially, the trial judge decided that the city and county cases had to be litigated separately, dismissed both lawsuits, and entered judgments on behalf of the respective school boards. In December 1973, this decision was reversed by the Sixth Circuit Court of Appeals, which ordered the district court to consider a metropolitan remedy. Newburg Area Council, Inc. v. Board of Education of Jefferson County, Ky., and Haycraft v. Board of Education of Louisville, 489 F.2d 925 (6th Cir. 1973). In reversing, the Sixth Circuit first looked at the county school system and found 96,000 students, 4 percent of whom were black and 65 percent of whom rode school buses to and from school. The county school board argued that the two or three elementary schools that were predominantly black had become so because of changing residential patterns and not because of board action. The court acknowledged that if residential changes had been the sole reason for the existence of predominantly black schools within the county system, then there would be no constitutional violation. However, the court pointed out that one elementary school had remained black since before the Brown decision of 1954, despite the board's affirmative duty to desegregate. Once state-imposed segregation was found to have existed in any school in the district, then all vestiges of the state-imposed segregation were not eliminated as long as the school remained an all-black school. The court stated:

> Since the Jefferson County Board has not eliminated all vestiges of state-imposed segregation from the system, it had the affirmative responsibility to see that no other school in addition to Newburg would become a racially identifiable black school. It could not be "neutral" with respect to students on assignments at [the other elementary schools]. It was required to insure that neither school would become racially identifiable. 489 F.2d at 929.

The court of appeals went on to examine the Louisville School District, which at the time of the Brown case had operated a racially segregated system as then required by Kentucky law. Despite so-called "integration" plans adopted in the intervening years by the Louisville Board of Education, the court found that over 80 percent of the schools in Louisville remained racially identifiable in a school system that was 50 percent white. Since the effects of pre-Brown state-imposed racial segregation still remained in the Louisville school system, the Sixth Circuit also reversed the trial judge's dismissal of the suit against the Louisville Board of Education.

The district court then ordered the preparation of a remedy for the metropolitan area as a whole, noting that neither Louisville nor Jefferson County had a unitary school system and that boundaries between the two were

not sacrosanct since they had been disregarded for purposes of segregation. Children had been systematically bused across the boundary to segregated schools.[1]

Meanwhile, the U.S. Supreme Court issued its first Detroit decision, 418 U.S. 717 (1974), which prohibited an order for cross-district busing, absent interdistrict constitutional violations or violations by all the districts subject to the order. Because the order in the Louisville and Jefferson County case covered all school districts in Jefferson County, the Supreme Court vacated the order and sent the case back to the Sixth Circuit for reconsideration in light of Milliken I. On remand, 510 F.2d 1358 (6th Cir. 1974), the Sixth Circuit distinguished the facts involving Louisville and Jefferson County from the situation in Detroit, and wrote:

> A vital distinction between Milliken and the present cases is that in the former there was no evidence that the outlying school districts had committed acts of de jure segregation or that they were operating dual school systems. Exactly the opposite is true here since both the Louisville and Jefferson County School Districts have. . .failed to eliminate all vestiges of state-imposed segregation. Consequently, as contrasted with the outlying Michigan districts, they are guilty of maintaining dual school systems. 510 F.2d at 1359.

The Sixth Circuit also noted the importance of the county as the primary unit of government in Kentucky and found that there were only two school systems involved, not 53 separate districts as in the Detroit metropolitan area. Thus a metropolitan remedy was administratively uncomplicated. The court then re-entered substantially its prior opinion from 1973 and ordered the district court to formulate a remedy, stating:

> [N]o justification appears for permitting the city and county school districts in Jefferson County to remain completely autonomous if the effect is to impede the process of desegregating the schools of the county as a whole. Id. at 1361 .

The Louisville School District then dissolved itself, and the Kentucky State Board of Education ordered the Jefferson County Board of Education to merge with Louisville's Board of Education to create a school system that would be 81 percent white.

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[1] Also in the record, but not the basis of the decision, was evidence of official actions that contributed to segregated housing.

In April 1975, the Supreme Court denied certiorari.[2] 421 U.S. 931. On July 30, the district court ordered a countywide desegregation plan to be carried out that fall. In so doing, the court rejected partial-day desegregation as failing to eliminate racially identifiable schools and exempted from the plan the small Anchorage Independent School District, because there was no evidence that it had discriminated.

The plan, developed with the aid of Jefferson County defendants and demographic experts of the plaintiffs, requires elementary schools to be 12-40 percent black and secondary schools to be 12.5-35 percent black. Judge James F. Gordon said his criteria for a satisfactory plan were fairness, predictability, and school and neighborhood stability. Exempted from busing were all pupils attending 16 elementary and 12 secondary schools that were within the racial guidelines. While planning time was short, a significant system was established so implementation of the plan could be monitored by the plaintiffs, by the court-appointed Master, and by the court. The plan was affirmed by the court of appeals on August 23, 1976. Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976). The plan at first postponed desegregation of first-graders, and then exempted them entirely from the plan until there is a countywide kindergarten program. Plaintiffs are challenging this exemption.

Meanwhile, on May 4, the court appointed the monitoring committee, which quickly got to work. By August 2, the committee's report had been filed and accepted, finding 28 elementary schools out of compliance during the 1975-76 school year.

The defendants argued that the 28 schools were not within the guidelines because of residential mobility, not deliberate school board action, and that the Supreme Court's ruling in the Pasadena case relieved the school board of any duty to reassign children annually to maintain set racial ratios. However, the court ruled that, unlike the situation in the Pasadena case, Jefferson County had never achieved a unitary school system. So the court need not determine what caused the unbalanced enrollment. The defendants were ordered to bring the 28 schools into compliance by busing 900 additional black children. The order was affirmed by the court of appeals. 560 F.2d 755 (6th Cir. 1977).

Wilmington: A Metropolitan Remedy for 1978-79

Besides the Indianapolis case (see p.14), the most important development since 1974 involving claims for metropolitan relief have come in Wilmington, Delaware. The desegregation case began in State court as Gebhart v. Belton, 33 Del. 144 (1952). This case was consolidated with cases in several other States that were segregated by State law and decided by the Supreme Court in May 1954 along with Brown v. Board of Education. A new case, Evans v. Buchanan,

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[2] In seeking review by the U.S. Supreme Court, the party that lost in the court below applies for a "writ of certiorari," which the Supreme Court grants if four justices favor the action.

was filed in 1957, charging failure to dismantle the dual school system in compliance with the Brown decisions. Subsequently, in the course of this litigation spanning more than two decades, the city of Wilmington entered the case as a plaintiff, and suburban New Castle County districts were joined with the State as defendants.

In 1974 a three-judge Federal court held that a 1968 Delaware statute that authorized the State Board of Education to reorganize and consolidate any school district but Wilmington was unconstitutional in excluding Wilmington. 379 F.Supp. 1218 (D. Del. 1974). Intentional action was inferred from the context, which included the fact that the Wilmington school district was more than two-thirds black at the time the law was enacted and remains the only majority-black district in the State. Thus a unitary school system had been effectively blocked. The court held that no compelling state interest justified maintaining a sacrosanct line between city and suburbs since the line had been breached often for segregative purposes. Moreover, the Supreme Court had held in North Carolina State Board of Education v. Swann (Swann II), 402 U.S. 43, 45 (1971), that a State legislature cannot impose restrictions on a school board's authority to operate a unitary system or to disestablish a dual system. In Wilmington, where about half of all black students in Delaware live, there were unremedied violations--schools that had been one race by law prior to Brown I remained racially identifiable. The court ordered the preparation of Wilmington-only and interdistrict plans. 393 F.Supp. 428 (D. Del. 1975). The Supreme Court affirmed this decision without issuing an opinion, 423 U.S. 963 (1975).

Following the Supreme Court's decision in Milliken I, (see pp. 22 and 36), the lower court reiterated its findings of interdistrict violations. These included evidence of cooperative action by the Wilmington and New Castle County school systems to send public school children across the city line to segregated schools; a recent State law to pay for interdistrict transportation of parochial school children, which aided white withdrawal from Wilmington public schools; and actions by other public officials contributing to segregation of public and private housing in city and suburbs, fostering one-race neighborhoods and restricting public housing to the central city.

In May 1976, the district court ordered the adoption of an interdistrict plan involving the 11 suburban districts. 416 F.Supp. 328 (D. Del. 1976). This decision was affirmed by the court of appeals, and the State was ordered to submit a plan. With repeated delays and the failure of the State to produce a plan that met constitutional standards, implementation was postponed until September 1978. 435 F.Supp. 832 (D. Del. 1977). When the Supreme Court refused to review the latest decision, 98 S.Ct. 235 (1977), the way was clear for implementation of the plan approved by District Judge Murray M. Schwartz on January 9, 1978. The district court rejected a plan developed by the New Castle County Planning Board of Education that would have left white students in their home neighborhoods for ten years and black students for two, with Wilmington schools never used for primary grades or senior high school, despite

a location of Wilmington high school that was ideal for desegregation purposes. The judge noted that the board's plan deferred to sentiment against busing small children but was apparently insensitive to busing small black children. While the court found some disproportionate burden unavoidable because of the smaller capacity of schools that are now predominantly black, it said the burden should not be excessive where a practical alternative exists.

The plan that will be implemented September 1978 requires busing of black children for nine years, while insuring use of Wilmington schools for the full grade span. In addition, the court followed the Supreme Court's lead in Milliken II (see p. 21) and ordered the State to provide money for educational programs to overcome the effects of segregation and to prevent resegregation. Included were inservice training of administrators, faculty, and other staff; special programs for reading and communication skills that do not employ resegregative practices; curriculum and materials free of bias and reflecting cultural pluralism; effective, nondiscriminatory counseling to prevent resegregation and to promote the nondiscriminatory offering of vocational training and college preparatory programs; nondiscriminatory policy on new school construction, additions, and closings; human relations programs for students and teachers; a nondiscriminatory disciplinary code, procedures, and practices; and the reassignment of staff to eliminate racial identifiability of faculties.

Also necessitated by the State legislature's inaction, the court tackled the difficulties arising from widely disparate local tax rates in the 11 school districts that were consolidated for purposes of desegregation. Faced with virtual anarchy if nothing was done, the court set a maximum rate within the range of rates previously existing in the separate districts, leaving the remaining decisions to the new school board. The court declined to set up a mechanism for monitoring implementation but kept jurisdiction in the case until the system is deemed completely unitary, as demonstrated over a reasonable period of time.

Boston

After prolonged investigation by the Department of Health, Education, and Welfare (HEW) into purported violations of Title VI of the Civil Rights Act (42 U.S.C. § 2000d) and efforts by the State of Massachusetts to implement the State's Racial Imbalance Act (Mass. G.L. C. 71 § 37C, 37D), the NAACP filed suit in 1972 on behalf of black Boston public school children and their parents. The plaintiffs alleged that the leadership of the Boston School Committee and the Superintendent of Schools violated rights under the 14th amendment. Of more than a dozen decisions in this case, the most important one set out in detail the actions of the Boston School Committee that constituted de jure segregation. Morgan v. Hennigan, 379 F.Supp. 410 (D. Mass. 1974). [As in some other school cases, the suit changed names as chairmen of the Boston School Committee came and went. The first decision was affirmed by the First Circuit

Court of Appeals[3] as Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975), and currently is known as Morgan v. McDonough, after John T. McDonough, the current chairman.

Judge W. Arthur Garrity, Jr., enumerated the actions taken by the school committee in an effort to avoid enforcement of the Racial Imbalance Act and recounted the long history of discriminatory actions proving that Boston did not follow a neutral "neighborhood school policy." Complex feeder patterns, open enrollment, and transfer policies deliberately fostered segregation. One subsystem of the Boston school system that was 71 percent nonwhite operated under a five-three-four grade pattern, including sixth to eighth grade middle schools. The other subsystem, which was 76 percent white, operated under a six-three-three system, with junior high schools. Thus, in the court's view, the structure impeded transfers between the two subsystems.

In addition, the pattern of use of facilities and selection of sites for new school buildings promoted segregation. Portable classrooms were added to crowded black schools, although space was plentiful in appropriate white schools. Some white schools were also permitted to become overcrowded rather than enroll students in black schools. Faculty and other staff were segregated, adding to the racial identifiability of schools. Vocational and examination schools were operated to promote segregation and to deny opportunity to black students.

The remedial desegregation plan was implemented in three phases, beginning in September 1975. It currently includes new community school districts; citywide magnet schools that are affiliated with higher education, business, and cultural institutions to improve the quality of the educational offering; and examination schools, all following some racial guidelines. The court has ordered a reassessment and improvement of support services at the examination schools by August 1978.

One-fourth of the students in the system attend magnet schools, some voluntarily traveling more than an hour. (Mandatory busing does not exceed 5 miles or 25 minutes.) The faculty has been desegregated, and the number of blacks in high administrative positions has been increased, despite continued "deliberate obstructionist tactics of the school committee." Civ. No. 72-911-C, Memorandum and Orders Modifying Desegregation Plan, May 6, 1977, p. 2.

To monitor compliance with the court order, Judge Garrity appointed a Citywide Coordinating Council and Community District Advisory Councils that report to him, leading to continued intervention by the court to remedy violations, to cope with school closing and student reassignment, and to meet contingencies. Additional groups have been established to promote parent and

[3]The First Circuit has jurisdiction over all Federal cases arising in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico.

community involvement in the desegregation process. Judge Garrity has been working toward turning the monitoring function over to the Boston School Committee, but the effort has been impeded by the "persistent failure of the school committee to organize and staff a functioning Department of Implementation--an entity within the school system which should be capable of effectively implementing the desegregation order of the court and advising and monitoring school department personnel in matters concerning desegregation." May 6, 1977, p. 3.

All Judge Garrity's decisions in this case that were appealed have been affirmed by the First Circuit, and the Supreme Court has declined to review them.

Buffalo

The litigation to desegregate the Buffalo Public Schools, Arthur v. Nyquist, 415 F.Supp. 904 (W.D.N.Y. 1976), affirmed in part, reversed in part, 573 F.2d 134 (2d Cir. 1978), illustrates two common characteristics of school desegregation cases. First, at the liability stage, a unique fact pattern emerges in each Northern city, after the plaintiffs have plumbed its history. Second, at the remedy stage, the court is seen trying to develop and enforce a plan that will safeguard constitutional rights, without becoming a "super-school board" (415 F.Supp. at 910).

The suit was brought on behalf of black and white parents of children attending the Buffalo public schools, the Citizens Council for Human Relations, and the local branch of the NAACP against the State Commissioner of Education and Board of Regents, local school officials, and the Mayor and Common Council of the City. All the parties agreed that severe racial isolation existed in the school system. Of 77 elementary schools, 55 were 80-100 percent of one race. Five out of six junior high and middle schools, and seven out of 13 high schools were 80-100 percent one race, although the entire school system was almost evenly divided (47 percent nonwhite).

The only issue before the court was whether the segregation came about intentionally. Chief Judge John T. Curtin decided that it had. Practices common to other school systems were evident, such as failure to recruit minority persons and assigning black teachers to black schools (415 F.Supp. 943-948), manipulation of zone boundaries, and the selection of sites for new schools with the knowledge that they would open overwhelmingly minority, where practical, less segregative alternatives existed. Optional zones were created in white residential areas near schools with large numbers of minority students, thus permitting white students to transfer out and increasing the racial identifiability of the school. 415 F.Supp. 936-941. Discriminatory admissions procedures were also followed for vocational-technical schools. 415 F.Supp. 941-943.

Blacks were concentrated in one high school by a language-transfer policy that was perhaps unique to Buffalo. (Described 415 F.Supp. 926-930). As a white and predominantly Polish neighborhood began to grow increasingly black, the school board fostered the racial identifiability of the neighborhood by making the high school even more heavily minority than the neighborhood. Since 1960 East High School offered no "special language" courses--Polish, Italian, Hebrew, Russian--allowing anyone to transfer to another high school that offered those languages. Special action by Pupil Personnel was required, although that office did not check to see if pupils actually studied the language at the receiving school. Pupil Personnel repeatedly suggested to the Superintendent that Polish be taught at East, and the U.S. Commission on Civil Rights noted in 1963 why East High School was overwhelmingly black. By way of contrast, in other geographic areas of the Buffalo system, language programs were instituted in response to needs, making transfers unnecessary. Although the language-transfer policy was finally ended in 1972, the judge reasoned that it was no excuse for the school board to point out that white students now refuse to return to East High School, since the board was responsible for making the school 99 percent minority, known as a "black school."

The responsibility of defendants other than local school authorities was also established. The city government used its power to control funds to stall and impede integration. The actions of the State Board of Regents and Commissioner in enforcing State integration laws, according to the court, "weave a saga of much talk and insufficient action"; 415 F.Supp. 949. The State had authority to remove the school board or to withhold funds. However, the ruling that the State shared responsibility was reversed by the Second Circuit Court of Appeals.[4] 573 F.2d 134 (2d Cir. 1978).

Evidence was also taken on the segregative housing policies of the Federal Government, Buffalo Municipal Housing Authority, and the real estate industry, not as a basis for the underlying proof of state action as a cause of segregation, but to refute the school board's sole defense that it had innocently imposed neighborhood school pupil assignments on fortuitously segregated residential patterns. The district judge noted that the city cannot hide behind a policy it has power to alleviate, 415 F.Supp. 968, adding that he subscribed to the doctrine enunciated in the two judicial circuits in the South.

> . . . If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. 415 F. Supp. at 968, citing Brewer v. School Board of City of Norfolk, Virginia, 397 F.2d 37, 41-42 (4th Cir. 1968) (en banc).[5]

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[4] The Second Circuit has jurisdiction over Federal cases arising in Vermont, New York, and Connecticut.

[5] The Fourth Circuit has jurisdiction over Federal cases arising in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

and

> When the segregated housing patterns are the result of "state action," we are faced with double discrimination. 415 F.Supp. 969, citing U.S. v. Texas Education Agency, 467 F.2d 848, 863-64 n. 22 (5th Cir.1972), (emphasis in original).

These passages--which are not isolated and rare references to housing--are worth noting because there may be some public misconception that the issue of segregated housing is a novelty that did not face the courts until school desegregation cases turned toward the North.

The remedy ordered by the court provides for compulsory racial balance of high schools and voluntary measures at the elementary level. There are magnet elementary schools, a "quality integrated education" program, and one-way busing that predates the desegregation decree and permits black students to transfer from core-city to peripheral predominantly white elementary schools. Plaintiffs are challenging the effectiveness and the disproportionate burden of the elementary transfer programs.

Cleveland

In 1973 a suit was filed on behalf of black children in Cleveland against several State political and educational office holders and the city Board of Education and Superintendent, alleging that they operated unconstitutionally segregated schools and followed policies, practices, and customs that had "the purpose and effect of perpetuating racial and economic segregation." Reed v. Rhodes, 422 F.Supp. 708, 712 (N.D. Ohio 1976). All parties agreed that the schools were in fact segregated since 92 percent of the black children of Cleveland attended schools that were more than 90 percent minority in 1975. Faculty and administrative assignments increased the racial identifiability of schools. The only issue at trial was whether the defendants were responsible. Chief Judge Frank J. Battisti held that the State and local education officials were.

In some instances, the segregative purpose or intent of actions was clear. In others, the judge reasoned that a presumption of segregative purpose arises when it is established that the natural, probable, and foreseeable result of official action was an increase or perpetuation of segregation. The presumption could be rebutted by a showing that the particular actions involved a consistent application of racially neutral principles. Although the school board argued that it adhered to a neutral neighborhood school policy, the judge found that, especially in handling problems associated with overcrowding, there was no policy at all as to desirable enrollment or geographic unit to be served, and that other policies were applied very flexibly to segregate, but seldom to integrate.

Discriminatory policies noted by the court included the use of intact busing of entire classes of black children; selection of school sites in the middle of ghettos, making inevitable the one-race composition of newly opened schools;

changes in attendance zones and district boundaries that fostered segregation; closing schools and reassigning students in a segregative manner, use of building additions, private rental facilities and portable classrooms to avoid sending children from overcrowded schools to schools of another race with available space; use of optional zones and special transfers to permit white students to transfer to white schools; segregating students by conversion of board-owned facilities to other uses; changing grade structures to effect racial segregation; and segregation of staff.

The State Board of Education was implicated in approving substandard double sessions during the mid-1960's, the court finding that most of the schools affected were predominantly black. The State board was also aware of segregated conditions throughout the Cleveland system and, according to the court, knew that it had authority to revoke school charters and withhold funds to bring about change. But the board did not act.

The court also noted that the school system had, in several ways, contributed to the racial identification of neighborhoods. By participating in planning sites for public housing and schools, school officials helped create racially segregated housing. These actions were in addition to those of other governmental agencies that promoted segregated housing.

In July 1977, the Sixth Circuit Court of Appeals, without reversing, vacating, or staying the original 1976 decision, sent the case back to the district court in light of several recent Supreme Court decisions, including Dayton (see p.15). The court of appeals noted that the 1976 district court opinion had been "extensive and careful" but suggested that there should be specifically numbered and labeled findings of fact and conclusions of law that the Supreme Court seemed to want. A new decision, still finding that both the State and local school officials had violated the Constitution, was released by the district court in February 1978. It was again appealed and was argued before the Sixth Circuit on June 20, 1978. A decision is expected before school opens in the fall of 1978.

Judge Battisti found that the violations have had systemwide impact, based on "over 200 separate instances of intentionally segregative behavior occurring in every part of the district at all grade levels. . . ." Seventeen types of discriminatory actions were enumerated with great specificity, including citations to exhibits in the original trial record. Actions with the natural, probable, and foreseeable consequence of segregation that could not be explained by reasons other than race were deemed purposeful segregation. Responding to the Supreme Court's mandate in Dayton and the Sixth Circuit's remand order, Judge Battisti ruled that the "incremental segregative effect" of the constitutional violations in Cleveland was 100 percent, thus requiring a systemwide remedy.

Meanwhile the parties were ordered to continue preparing desegregation plans, following guidelines issued by the district court on December 7, 1976. As

a first step, 700 teachers and 50 administrators were reassigned in September 1977. On February 6, 1978, Chief Judge Battisti also approved a desegregation plan to be implemented fully in the fall of 1978 rather than over a 3-year period, as the defendants had proposed.

Implementation of desegregation in Cleveland, the judge repeatedly indicated, was complicated by the district's $50 million operating deficit, which was the result of a "lack of managerial skill" and a "primitive" financial system--not of desegregation.

After several missed paydays early in 1978, the system was able to complete the 1977-78 school year only because the State in April advanced all the State assistance funds scheduled for the fall of 1978. Unless a levy (already twice soundly defeated) is passed this summer or new State aid is provided, there appears no way that the Cleveland schools will have sufficient money to operate through the fall of 1978.

In response to school board claims that desegregation would disturb the quality of education in Cleveland, the judge concluded his February 6 opinion with the comment:

> It is painfully clear that no amount of desegregation could harm this school system. It is the sincere hope and belief of the Court that when desegregation comes and the constitutional rights of plaintiffs are restored, the rights of all pupils and parents to administrative competence, financial stability, and academic excellence will also be restored. . . .

The district judge, frustrated by what he perceived as a lack of cooperation from school officials, ordered the Cleveland board in April and May (1) to create a Department of Desegregation Implementation, (2) to hire Boston's Dr. Charles Leftwich as a deputy superintendent in charge of that department, (3) to hire seven persons desired by Dr. Leftwich for assistance at salaries of $23,000 to $35,000, and (4) to turn over operating control of all major school departments to Dr. Leftwich and his staff. On July 6 the Sixth Circuit vacated the latter two parts of the order on grounds that the district judge had exceeded his authority by encroaching on the province of educational authorities.

Following the court orders placing most of the power in the hands of Dr. Leftwich, long-time Cleveland School Superintendent Paul Briggs submitted his resignation effective June 30, 1978. Preparation for systemwide desegregation in September 1978 continues under the direction of Dr. Leftwich.

The plan adopted by the court in February was based on the third plan submitted by Cleveland school officials. The court deemed the first two clearly unconstitutional, involving voluntary, part-time desegregated experiences. The school board has been reluctant to close as many schools as declining enrollment, cost exigencies, and desegregation planning would warrant, in the

interest of preserving neighborhood schools. With some modifications by Special Master Daniel R. McCarthy, the approved plan is similar to those adopted in Detroit and Wilmington, including nine educational components. Besides ordering pupil reassignment involving transportation of about 52,000 students, the plan provides for nondiscriminatory testing; a reading program that does not resegregate; specially trained counselors; magnet schools; cooperation with universities, business, and cultural institutions; means to effect nondiscriminatory participation in extracurricular activities; staff development and student training in human relations before the end of the 1977-78 school year; a code of student rights, responsibilities, and discipline with fair procedures for implementation, demonstrated by statistics to be supplied to the court; and a school-community relations program.

The court gave four reasons for its far-reaching remedial plan: (1) to remedy the academic effects of prior segregation; (2) to ensure that existing and future programs will be administered in a nondiscriminatory manner; (3) to maintain a secure integrated school environment in which the rights of all students are protected; and (4) to guarantee that the court-ordered provisions are fully implemented (Feb. 6 opinion, p. 73). The court also stated that "the defendants shall not assign students to ability groupings where such assignment results in racially segregated classrooms." Judge Battisti emphasized that the degree of detailed intervention by the court was necessitated by the school authorities' inability or unwillingness to plan for desegregation.

Columbus, Ohio

This suit was originally filed in 1973, and the NAACP intervened on behalf of additional plaintiffs in 1975. As in Cleveland, State as well as local school officials are defendants. In March 1977, Judge Robert H. Duncan held that the State Board of Education, State Superintendent of Public Instruction and the local board were responsible for depriving minority children in Columbus of their rights under the 14th amendment. Penick v. Columbus Board of Education, 429 F.Supp. 229 (S.D. Ohio 1977).

No one disputed the existence of racial isolation in the Columbus schools. Seventy percent of all children, at the time of trial, were in predominantly one-race schools (80-100 percent of one race). The staff was also segregated. The crucial issue was whether segregation existed as a result of deliberate governmental action. Judge Duncan specifically invoked the Keyes presumption (see p.18), then ruled that the defendant school officials had failed to prove "that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions." 429 F.Supp. at 260. As evidence of intent, the court looked at the board's reaction to complaints. The Ohio Civil Rights Commission had issued a formal complaint, and in 1974 arrived at a consent agreement with the Columbus School Board to desegregate faculty and to distribute experienced teachers fairly. The court was convinced of segregatory intent in the board's unwillingness to reassign or recruit minority faculty before the commission's action.

The judge also gave weight to a history of gerrymandering of school boundaries before Brown and remedial efforts the court deemed grudging and inadequate. In 1967, the board permitted (but provided no transportation for) voluntary transfers. After six years, the policy had little integrative impact, yet the board would not go further. In 1972, the Columbus board refused to change its policy of making integrated education available, to one of providing it. Opportunities for integrated education were offered through magnet-type learning centers and districtwide career centers, all voluntary. The board voted down a proposal to create an advisory committee to ensure that site selection for new schools would be integrative. In April 1973, continuing past policies, the "Columbus Plan" was adopted to allow four types of educational alternatives. Transfers could be obtained for racial balance or for vocational, educational, and occupational programs. In 1975, two years after this lawsuit was filed, free transportation was provided for the first time for full-day transfers for purposes of racial balance. All these efforts did not appreciably lessen racial isolation.

Although the court rejected the plaintiffs' argument that a neighborhood school policy superimposed on privately segregated housing made the board a participant in discrimination, the court did recognize the reciprocal effect between racially identifiable schools and housing. The court felt that while school desegregation plans cannot be expected to undo the effects of segregated housing, practices can be selected that have integrative, rather than segregative, tendencies. In the case of Columbus, the board repeatedly rejected more integrative alternatives, although repeated complaints by the NAACP, Urban League, and other community groups called attention to the effect of board practices, for which there were inadequate explanations of a proper neutral purpose. Racial isolation was therefore the result of decisions selecting school sites, assigning faculty, drawing boundaries, and creating optional zones.

The court ordered the local and State educational authorities to begin preparing desegregation plans. On July 29, 1977, the court issued guidelines, specifying that minority enrollment at all schools must be between 17 and 47 percent. After rejecting earlier offerings, on October 7, 1977, the court approved a new plan proposed by the school board's minority, adopted by the majority in order not to relinquish its control over education to the court.

The plan scheduled to begin in September 1978, provides for pairing, clustering, and redrawing of zone boundary lines and will likely involve busing about 40,000 of the system's 92,000 students. The judge, for the remainder, has deferred to the board to make most decisions, proposing only that input be obtained from the community, parents, teachers, and students. The judge has also required frequent, periodic, detailed reports during the planning process, to ensure good faith progress.

As in the Cleveland case, the court found that the Ohio Board of Education and Superintendent of Public Instruction shared responsibility with the local board for the constitutional violation on the basis of the State

officials' responsibility for education and knowledge of what the court perceived as their affirmative duty and power to prevent and eliminate segregation. The State thus must share in the cost of desegregation. The court is scrutinizing costs and has warned that the board must show the direct relation of new expenses to desegregation, in order not to mislead the community by exaggerating the cost of desegregation. Expenses to meet educational needs that existed prior to the court order cannot be attributed to desegregation.

On July 13 the Sixth Circuit Court of Appeals affirmed the district court's finding that the school board had violated the Constitution but did not affirm all the findings as to the liability of the State. The Columbus Board of Education has petitioned the Supreme Court for a hearing on the case.

PART III. SIGNIFICANT RECENT CALIFORNIA STATE COURT DECISIONS

Los Angeles

In California, segregation regardless of cause violates the State constitution [Art. I, § 7(a)]. There is no distinction between de facto and de jure segregation. In handing down its opinion in the Los Angeles school desegregation case, Crawford v. Board of Education of the City of Los Angeles, 17 Cal. 3d 280 (1976), the California Supreme Court unanimously reaffirmed a position it had consistently taken since 1963 (in Jackson v. Pasadena School District, 59 Cal. 2d 876, also unanimous), that there is no need to determine whether segregation is the result of deliberate state action.

In Los Angeles the trial court determined that the school board had intentionally and deliberately caused segregation, although that proof was not required. According to the California Supreme Court, a school board in California may not impose a neighborhood school assignment policy that is neutral on its face upon privately or publicly caused residential segregation.

The California court rejected the de facto-de jure distinction for four reasons, the first being judicial economy. It takes too long to try to discern why schools are segregated, scrutinizing every act and failure to act of a school board and other State officials. The second was harm to children. Racial isolation, regardless of cause, stigmatizes and harms children (citing the 1976 report of the U.S. Commission on Civil Rights, "Racial Isolation in the Public Schools"). The third reason concerned improper power that was, in effect, granted to acts of private discrimination. If minorities have been deprived of the opportunity to move into certain neighborhoods by private acts of discrimination, a school board's adoption and retention of a rigid neighborhood school policy would impermissibly grant to private individuals the power to exclude minority children from certain public schools simply by refusing to sell or rent homes to their families. The fourth was the school board's plenary authority. In making short- and long-term decisions, such as defining neighborhoods, selecting school sites and sizes, a board to a large degree controls racial and ethnic attendance patterns.

Plaintiffs, minority children attending school in the Los Angeles Unified School District, filed this class action in 1963. The long trial, which began in 1968, resulted in 62 volumes of transcripts and a decision in 1970 announcing that the school system was one of the most segregated in the Nation. The Superior Court judge found that the school board contributed to the problem, instead of alleviating it. The court, in rejecting the board's claim that it could weigh the educational value of desegregation against the financial cost, stated that you cannot weigh away children's rights; there is an affirmative duty to avoid discriminatory results. However, the board must weigh the long- and short-range educational and economic costs and benefits of those remedies that are constitutionally sufficient.

Deference was paid by the court to a school board, working with community leaders and affected citizens, to devise an educationally sound remedy suited to a particular district. The school board must adopt a "reasonably feasible" plan or it can be ordered by the court to prepare and implement a plan to eliminate segregation and its accompanying harm. If a board is intractable, the trial court may formulate and supervise a plan. As in the Federal rule enunciated in Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971), the California constitution requires no fixed racial and ethnic mix in each school, but percentages may be employed in determining if a school is actually segregated and in devising a plan. Specific ratios may also be adopted by a school board if it believes them to be educationally desirable. The California Supreme Court added parenthetically:

> By defining a segregated school in terms of the isolation of minority students from other students we in no way imply that an integrated educational experience benefits only minority students. We concur fully in the following observation of a respected federal judge: "Although the principal victims of a racially segregated education are the minority students, it is no less true that racially segregated schools inflict considerable harm on white students and society generally." Hart v. Community School Board of Brooklyn, N.Y. Sch. D. #21...(Weinstein, J.). Slip opinion, p. 41, n. 15 (citations omitted).

Devising a plan for Los Angeles has presented special problems. First, the size and geography of the district are formidable. The district, the second largest in the Nation, is surrounded by many independent suburban districts unaffected by this court order. Second, the racial and ethnic diversity of the district is considerable. In 1968, the students were 20 percent Mexican-American, 22.6 percent black, 3.6 percent Oriental, 0.2 percent American Indian, and 54 percent Anglo. The proportion of minority students has increased since then. The California Supreme Court suggested an array of desegregation techniques--redrawing attendance zones, pairing, clustering, magnet schools, and satellite zoning--but indicated that:

> so long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, we do not believe the judiciary should intervene in the desegregation process. Under such circumstance a court thus should not step in even if it believes that alternative desegregation techniques may produce more rapid desegregation in the school district. Slip opinion, p. 46.

At first the board interpreted the State Supreme Court's deference too broadly and submitted a plan that was clearly unconstitutional, which was rejected by Superior Court Judge Paul Egly, July 6, 1977. The board had previously spurned a plan submitted by the broadly based community group, the Citizens' Advisory Committee on Student Integration.

February 7, 1978, Judge Egly allowed a new plan to be implemented over a 2-year period, without approving the plan. It provides for strictly voluntary programs for grades kindergarten to three and nine to twelve and some mandatory reassignment when magnet schools do not desegregate adequately for grades four to eight. Tentatively, schools that are 70 percent or more Anglo or minority are defined as "segregated."

In January 1978, parents were surveyed as to their preferences among a listing of possible magnet curricula to help the district decide what to offer. Changes may be made in the plan after receipt of recommendations from experts appointed by the court. The judge will review the extent to which the plan meets constitutional requirements.

San Diego

This action to desegregate the San Diego School District was filed in 1967. At last count, there were 121,000 students in the district, 14.5 percent black, 14 percent Hispanic, 5.2 Asian American, 0.2 percent Alaskan/Indian, and 66 percent Anglo. Unlike many other school desegregation suits, the defendants did not concede that the schools were in fact segregated. Besides receiving testimony, in the course of the trial, the judge, with counsel, visited schools unannounced and determined that facilities in minority isolated schools were better than in majority schools, reflecting greater expenditures. Twenty-three schools were found to be segregated, however. That was sufficient to decide the liability issue in California. Carlin v. Bd. of Ed., Cal. Super. (March 9, 1977).

In discussing remedy, Superior Court Judge Louis M. Welsh noted that the Crawford ruling (see p. 49) requires reasonable, feasible steps toward integration (defined as "harmonious interaction among races"), while eliminating the harmful effects of segregation. Factors that may be considered are costs, the effect on children, the risk of resegregation by withdrawal of children, and the need for quality integrated education. The degree of court involvement in framing the remedy depends on the district's commitment to desegregation and the progress that results from the district's program. While the parties differ in their evaluation of the district's commitment, the court characterized the school board from 1965 to date as not "recalcitrant or intractable," id. at p. 17, only "silent" and "evasive," id. at p. 8, when faced with prodding from citizen committees and the State Board of Education.

Judge Welsh found the signals conflicting that had emanated from State and Federal courts and from political leaders. He noted that reports prepared by the black educator hired to help the district proceed toward desegregation were ignored, not even presented to the school board. The Superintendent seemed determined not to act until ordered by a court. Moreover, Max Rafferty, while State Superintendent, said the State lacked authority to enforce desegregation. Judge Welsh found State law unclear until the Crawford decision was handed down in June 1976. Nevertheless, the San Diego Superintendent

after that date claimed there was no duty to desegregate because segregation was not intentional, despite the explicit holding in Crawford that no showing of intent was required.

On the other hand, Judge Welsh found many people in the San Diego system to be ahead of the Superintendent. Magnet schools and transfer programs have had some success. While figures from 1966-76 showed more children in racially "imbalanced" schools (50-90 percent minority), fewer were in "isolated" schools (90-100 percent minority). The judge was, therefore, willing to give the district more time to demonstrate its commitment. He was also concerned that bilingual programs required by State and Federal law require concentration of Hispanic children for effectiveness and economy and create "a conflict of commitments," id. at p. 15, as the Office for Civil Rights of HEW has required dispersing minority teachers, diluting the bilingual teaching staff. The judge gave weight to negative findings of social scientists, such as Nancy St. John and Harold Gerard and Norman Miller, about busing. He was also impressed with testimony that children now receiving the benefit of Federal compensatory education funds will lose them, if dispersed.[1]

In further support of a limited remedy, the judge assumed, first, that metropolitan segregation is due to private pressures, preferences, and prejudices--not to governmental policies; and, second, that parents have a "right" to educate children as they choose, which he said is a "due process right" to attend a neighborhood school.[2] He reasoned that states can give rights that are greater than Federal rights, if there is no conflict with another Federal right. Arguing that there is a Federal "due process right" to attend neighborhood schools unless there is intentional segregation in violation of the Federal Constitution, the judge attempted to work his way around the California Supreme Court's ruling in Crawford that the California constitution requires desegregation, regardless of cause. He argued that there is no showing that the school board violated Federal rights (since segregation was not intentional), and it is therefore probably impermissible to have extensive mandatory busing, although with community support there can be limited mandatory assignments.[3]

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[1] This is a result of funding only 50 percent of need, so that schools with high concentrations of poor children are given priority; however, no district as a whole loses funds.

[2] This is an argument rejected by State and Federal courts on numerous occasions. Judge Welsh cited dicta--statements made in the course of judicial opinions that are not critical to the court's ruling--and minority opinions of the Supreme Court.

[3] In the judgment of the authors, to require community support to vindicate minority rights is to subject individual rights to the will of the majority, contrary to the purpose of the 14th amendment, as interpreted by the Supreme Court.

In encouraging "reasonably feasible" steps to desegregate, the judge focused on the need for preparing staff, parents, and students, and the need to ensure that minority students continue to get compensatory education and bilingual programs. While many people might question his interpretation of the law, few would cavil with his statement that mere mixing of children can be harmful to minority children, or with his conclusion that there must be changes in teaching methods so as not to doom minority children to failure in the name of equality.

A limited magnet school plan was implemented in 1977-78. In two schools there are bilingual "schools within schools" providing all-day instruction in Spanish for grades kindergarten to two, and half-day in the upper elementary grades. In 1978-79 there will be a few magnet high schools and a continuation of similar limited steps "to integrate, not just desegregate." Judge Welsh concluded his opinion: "A whole-hearted effort under enthusiastic leadership can accomplish this and set an example for the nation."

APPENDIX. HOW TO FIND A COURT DECISION

Anyone who works in a particular district or who wishes to do research on desegregation should not be hesitant to go to the text of a district court decision. It is usually written in straightforward, nonlegal language. Much is necessarily lost in attempts such as this one to summarize in three or so pages an opinion of perhaps 150 pages or more. Judges in school desegregation cases are usually sensitive to the need to make their actions comprehensible to the local community. Local newspapers, however, are faced with the difficult task of summarizing or excerpting the essentials of long opinions.

Legal citations have been included in this booklet not as esoteric signs of the lawyer's cult but to aid in the location of a decision. Any small law library will include volumes of Federal decisions.

A district court citation will look something like this:

367 F.Supp. 179 (D. Neb. 1973).

It means the case can be found in volume 367 of the Federal Supplement at page 179. Court of appeals citations look like:

521 F.2d 530 (8th Cir. 1975).

This means the decision appears in volume 521 of the Federal Reporter, second series, at page 530.

There are three different editions of United States Supreme Court decisions, which slightly complicates citations. For example, 423 U.S. 946 (1975) refers to the official United States Reports. However, these are slow to be published, so many law libraries carry the West Publishing Company's edition, which are listed, for example, as 97 S.Ct. 2905 (1977), meaning volume 97 of West's Supreme Court Reporter at page 2905. A third version is that of the Lawyers' Cooperative Publishing Company, which will look like: 10 L.Ed. 2d 338 (1963), meaning volume 10, page 338, of the Lawyers' Cooperative Edition, second series. Important Supreme Court decisions are published in full a few days after they are handed down in United States Law Week, a publication of the Bureau of National Affairs. These citations might look like:

46 U.S.L.W. 3196 (Oct. 4, 1977).

If you have a citation for one edition, but the library carries another, seek help.